

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

Date: 4 December 2017

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the subject of judicial review and environmental judicial review reform. The Ministry of Justice (MoJ) denied holding some of the requested information and refused to disclose the remainder citing regulation 12(4)(d) (information in the course of completion), regulation 12(4)(e) (internal communications) and regulation 12(5)(b) (the course of justice) of the EIR.
2. During the course of the Commissioner's investigation, the MoJ disclosed some information it had previously withheld.
3. The Commissioner has investigated the MoJ's application of regulations 12(4)(e) (internal communications) and 12(5)(b) (the course of justice) to the remaining withheld information.
4. The Commissioner's decision is that the MoJ has correctly applied the above regulations of the EIR to the withheld information. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. In late 2015 the government invited comments on how to improve the rules relating to costs protection in certain environmental challenges,

governed by Section VII of Part 45 of the Civil Procedure Rules (CPR), related parts of the CPR and associated Practice Directions (the environmental costs protection regime)¹.

6. During the course of the MoJ's handling of the request for information in this case, the government published its response to the 'Costs Protection in Environmental Claims' consultation². That document explains the changes that the government will be making, and the rationale for them. It is supported by an Impact Assessment.

Request and response

7. On 1 September 2016, the complainant wrote to the MoJ and requested information in the following terms:

"This is a request for information under the Environmental Information Regulations (2004)...For the avoidance of doubt, we consider that the information requested below, which relates to the proposed reform of the legal process of Judicial Review, is 'environmental information'...

We request confirmation and release of the following categories of information for each of the circumstances number 1-3 below:

*"a) copies of correspondence (letters or emails);
b) confirmation of the dates of all meetings; and
c) copies of the associated agenda and minutes, notes or other record of meetings identified above.*

1) As sent, or from meetings held, between former Ministers Chris Grayling MP and Michael Gove MP (and their respective advisors), for the period of 1 April 2015 to 30 July 2015 and in relation to Judicial Review reform.

2) As sent, or from meetings held, between Elizabeth Truss MP and Michael Gove MP (and their respective advisors) since 1 July 2016 in relation to Judicial Review reform.

¹ <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/>

² <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/results/costs-protection-in-environmental-claims-govt-response.pdf>

3) As sent or held between Elizabeth Truss MP and Andrea Leadsom MP (and their respective advisors) since 1 July 2016 in relation to environmental judicial review.

In addition please also confirm and release to us:

4) Copies of any briefings given to Elizabeth Truss MP, since she joined the department as Secretary of State, on the subject of judicial review and environmental judicial review reform.

5) Any reports, briefings, notes, memos or other evidence and statistical data, that the Ministry of Justice is relying on to justify the current proposals for reform (but excluding the published consultation documents), in relation to:

a. Any abuse of the Judicial Review process with regards to environmental claims.

b. The impact of environmental Judicial Review on the economy.

c. The perceived desirability of or 'need' to reform the judicial review (including environmental JR)".

8. The MoJ responded on 13 October 2016. It explained that questions 1 and 2 had been handled under the FOIA, question 3 had been handled under the EIR and questions 4 and 5 had been handled under the EIR and the FOIA.
9. In relation to questions 1, 2 and 3, the MoJ denied holding the requested information explaining that there had not been any meetings or correspondence between the Ministers named in the request.
10. With respect to questions 4 and 5, the MoJ confirmed that it did not hold information in relation to Judicial Review reform.
11. With regard to the parts of the request relating to the Aarhus Convention environmental costs rules it confirmed that it held some of the requested information. However it refused to provide that information citing the following exceptions as its basis for doing so:
 - regulation 12(4)(d) information in the course of completion
 - regulation 12(4)(e) internal communications
 - regulation 12(5)(b) the course of justice.
12. Following an internal review the MoJ wrote to the complainant on 1 December 2016. It acknowledged that the government published its response to the 'Costs Protection in Environmental Claims' consultation on 17 November 2016 and confirmed that it had conducted the internal review in the knowledge of that announcement.

13. The MoJ upheld its original position, namely that it held some information within the scope of parts (4) and (5) of the request relating to environmental Judicial Reviews but that it was exempt from disclosure.

Scope of the case

14. The complainant contacted the Commissioner on 6 January 2017 to complain about the way his request for information had been handled.
15. He raised issues with respect to the MoJ's handling of the request, including that he considered that the request should have been dealt with under the EIRs rather than divided under the FOIA and the EIRs. He also disputed the MoJ's application of the EIR exceptions and, with respect to the MoJ's consideration of the public interest test, he disputed that the MoJ had taken into account the presumption in favour of disclosure to the public as per regulation 12(2) of the EIR.
16. The withheld information, information within the scope of parts (4) and (5) of the request, was considered by the MoJ under the EIR. The Commissioner wrote to the complainant explaining that her investigation would look at whether the MoJ was entitled to rely on exception(s) as a basis for refusing to provide this information, including its consideration of the public interest test.
17. The complainant responded, confirming that he considered that the requests should be considered under the EIR expanding on his reasons for disputing the MoJ's application of exceptions to the withheld information.
18. During the course of the Commissioner's investigation, the MoJ acknowledged that, given the passage of time, some information within the scope of the request which had previously been withheld could be disclosed. Accordingly, the MoJ disclosed that information to the complainant. It explained that the information it provided was redacted where it related to either legal advice or the names or contact details of officials.
19. With respect to the information within the scope of the request that it continued to withhold, the MoJ confirmed that it considered that regulations 12(4)(e) and 12(5)(b) applied.
20. In light of the above, the analysis below considers the MoJ's application of regulations 12(4)(e) and 12(5)(b) to the information withheld by virtue of those exceptions.

Reasons for decision

Regulation 12(4)(e) the disclosure of internal communications

21. Regulation 12(4)(e) of the EIR states:

"For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that...

(e) the request involves the disclosure of internal communications."

22. In this case, the MoJ cited regulation 12(8) in relation to its application of regulation 12(4)(e), explaining to the complainant:

"...for the purposes of paragraph (4)(e), internal communications include communications between government departments..."

23. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The purpose of this exception is to allow a public authority to discuss the merits of proposals and the implications of decisions internally without outside interference.

24. The Commissioner acknowledges that the concept of 'internal communications' is broad and covers all internal communications, not just those actually reflecting internal thinking, and will include any information intended to be communicated to others or to be placed on file where others may consult it. However, the Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private.

25. Regulation 12(4)(e) is a class-based exception so it is not necessary to consider the sensitivity of the information in order for it to be engaged. A wide range of internal documents will therefore be caught. However, this exception is also subject to the public interest test outlined in regulation 12(1)(b) of the EIR.

Does the withheld information constitute 'internal communications'?

26. The EIR do not provide a definition of what constitutes an internal communication. However, the Commissioner accepts that, in general, communications within one public authority will constitute 'internal communications' while a communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.

27. In correspondence with the complainant, the MoJ told him:

"The information in question forms part of the ongoing consideration of this policy by officials and Ministers. It is important that this process takes place out of the public eye to enable the MoJ to develop wider government policy proposals and understand the impact of possible policy changes under consideration".

28. During the course of her investigation the MoJ provided the Commissioner with a copy of the withheld information.

29. The Commissioner, in her guidance³, acknowledges:

"An 'internal' communication is a communication within one public authority. All central government departments are deemed to be one public authority for these purposes".

30. Having considered the MoJ's explanations and referred to the withheld information the Commissioner is satisfied that it comprises communications between central government departments which are expressly included as internal communications by virtue of regulation 12(8) EIR.

31. It follows that she is satisfied that the small amount of information withheld under regulation 12(4)(e) comprises internal communications, and that the regulation has been applied correctly to this information.

The public interest test

32. As she is satisfied that regulation 12(4)(e) is engaged in respect of the information withheld by virtue of that exception, the Commissioner has gone on to consider the public interest test attached to the application of this exception, as required by regulation 12(1)(b) of the EIR. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

33. When carrying out the test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).

³ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

Public interest arguments in favour of disclosing the requested information

34. The complainant disputed the MoJ's view that it had met the public interest by consulting on proposals to revise the costs protection scheme.

35. Arguing in favour of disclosure, the complainant told the MoJ:

"...there is a very strong public interest in understanding the evidence and decisions underlying the current policy position that is held by government which seeks the reform – to the possible detriment of the public, or a section thereof - of a key constitutional and public right/safe-guard used to review illegal acts taken by the government".

36. The MoJ acknowledged that the information relates to government policy on costs protection in environmental claims which is a matter of public interest. It recognised that disclosure would inform the public of the interaction between the MoJ and stakeholders on that topic.

37. It further accepted that release of the requested information would be consistent with the Government's commitment to greater transparency.

Public interest arguments in favour of maintaining the exception

38. In favour of maintaining the exception, the MoJ told the complainant that it was vital that officials have the necessary opportunity to deliberate and explore all available options within a safe space. It also considered it vital that officials have space to engage with relevant stakeholders and consider their responses.

39. It argued that to place material in the public domain that formed part of ongoing consideration of a policy would not be in the public interest.

40. In correspondence with the Commissioner the MoJ argued that the policy relating to the legal costs rules is still under development and that disclosure would be likely to prejudice the convention of collective responsibility in reaching cross-Government agreement which would not be in the public interest.

41. In that respect it advised the Commissioner that proceedings for judicial review have been brought against the Secretary of State for Justice in relation to the Department's approach in implementing a costs regime for environmental judicial reviews, directly challenging the secondary legislation which gives effect to that regime.

Balance of the public interest

42. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exception. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information in question must be disclosed.
43. There is no automatic or inherent public interest in withholding an internal communication: arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
44. The Commissioner recognises that there is always a general public interest in disclosing environmental information. This is derived from the purpose behind the EIR. In addition, there may be an argument for informing public debate on the particular environmental issue that the information relates to.
45. In this case, the Commissioner recognises that changes in respect of legal costs rules in environmental cases have proved contentious, as evidenced by the proceedings for judicial review. She notes that news of the judicial review challenge has been reported by the media⁴.
46. The Commissioner accepts that the fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that is the subject of that media interest. In this case, however, she gives weight to the public interest argument that the topic is clearly a matter of public concern.
47. The Commissioner also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making process.
48. However, the Commissioner acknowledges that the underlying rationale behind this exception is that public authorities should have the necessary space to think in private. In that respect, she is mindful that the public interest factors for this exception should focus on protecting the internal deliberation and decision making processes.

⁴ <https://www.theguardian.com/law/2017/feb/28/environment-groups-risk-prohibitive-costs-for-legal-challenges>

49. In this case, the Commissioner accepts that there is a strong public interest in officials and Ministers having the private thinking space to consider policy and policy changes in relation to government policy on costs protection in environmental claims.
50. The Commissioner finds that at the time of the request and internal review, and also now, there was and is a requirement to maintain a safe space for the MoJ to discuss the costs policy unhindered by unwarranted outside interference.
51. While she acknowledges that there is clearly a public interest in the way the costs rules work, she does not find that there is a compelling public interest reason in this case which warrants disclosing the requested information and is satisfied that disclosure would result in harm to the MoJ's ability to develop policy in a safe space.
52. In reaching her decision, the Commissioner has considered the content and sensitivity of the information in question and the circumstances of the request. She has also taken into account the material in the public domain (the consultation document, consultation response and impact assessment). In that respect, she acknowledges that the government has taken some steps to inform and engage with the public in relation to the development of its policy on costs protection in environmental claims.
53. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and she therefore accepts that the internal communications in question should be withheld.

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

54. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

“the course of justice, 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”.

55. The successful application of the exception is therefore dependent on a public authority being able to demonstrate that the following three conditions are met:
 - (i) the withheld information relates to one or more of the factors described in the exception;

- (ii) disclosure would have an adverse effect on one or more of the factors cited; and
- (iii) the public interest in maintaining the exception outweighs the public interest in disclosure.

56. The fact that the information is capable of attracting legal professional privilege is not sufficient for it engage regulation 12(5)(b). For the exception to be engaged its disclosure must have an adverse effect on the course of justice.
57. As long as it can be shown that disclosure would produce an adverse effect as specified in the exception, the exception is engaged. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test⁵.
58. The term '*would have an adverse effect*' is taken to mean that it is more probable than not that the adverse effect would happen.
59. 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 legal professional privilege (LPP).
60. Her 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 exchange between the client and his, her or its lawyers, as well as exchange 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."

61. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). There must be a real prospect or likelihood of litigation rather than just a fear or possibility.

⁵ https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

62. With respect to the nature of the information withheld by virtue of regulation 12(5)(b) in this case, the MoJ told the complainant:

"For clarity, I can confirm that the application of Regulation 12 (5) (b) relates to advice we received from counsel and departmental lawyers pre and post consultation on proposals to revise the costs protection scheme for eligible environmental challenges".

63. With regard to the disclosure of the withheld information in this case having an adverse effect upon the course of justice the MoJ told the complainant:

"Disclosure of the Department's legal advice would not only waive the privilege which attaches to the information, but could also undermine the Department's ability to defend its legal interests. We do not consider there to be any special or unusual factors present which justify not refusing to disclose the requested information in the present circumstances".

64. During the course of the Commissioner's investigation, the MoJ clarified that it received Counsel's advice and explained that the legal advice contained in the withheld information is a summary of the original advice. It confirmed that it considers that the withheld information is subject to both types of privilege within the concept of LPP - advice privilege and litigation privilege – and that its disclosure would have an adverse effect upon the course of justice.

65. It told the Commissioner that, having revisited the request, it considered that it was appropriate to apply litigation privilege to the withheld material as well as advice privilege. In support of that view, the MoJ advised the Commissioner of developments since the outcome of the internal review. It explained that since that time, parties have brought proceedings for judicial review against the Secretary of State for Justice in relation to the department's approach in implementing a costs regime for environmental judicial reviews, and directly challenging the secondary legislation which gives effect to that regime.

66. The Information Tribunal considered the application of LPP under the EIR in the case of *Kirkaldie v Information Commissioner & Thanet District Council* (EA/2006/0001, 4 July 2006)⁶. In that case, the Tribunal stated:

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration

⁶ <http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i94/Kirkaldie.pdf>

of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation."

67. The Commissioner recognises that legal professional privilege (LPP) exists to ensure complete fairness in legal proceedings. LPP protects advice given by a lawyer to a client and confidential communications between them about that advice.
68. Furthermore, the Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception and previous decisions issued by the Commissioner and the Information Tribunal have recognised that, where the process is ongoing, disclosure would likely prejudice this integrity.
69. She also recognises that the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure **would** have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
70. In this case, having considered the matter and having viewed the withheld information, the Commissioner is satisfied that the withheld information relates to legally privileged information and that, as the advice is still 'live', disclosure of that information would have an adverse effect on the course of justice.
71. Accordingly, the Commissioner has concluded that the MoJ was entitled to engage the exception at regulation 12(5)(b) in respect of the information withheld on that basis.

Public interest test

72. 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.

Public interest arguments in favour of disclosing the requested information

73. The complainant argued that there is a strong public interest in disclosure, referring in particular to the presumption in favour of disclosure.
74. In correspondence with the MoJ the complainant also argued that there was a strong public interest in disclosure:

"... because the proposed reforms are likely to significantly erode the ability of members of the public to obtain fair and affordable access to the courts..."

Public interest arguments in favour of maintaining the exception

75. In favour of maintaining the exception, the MoJ told the complainant that disclosure of legally privileged information would lead to a weakening of confidence in the general principle of legal professional privilege.
76. It also argued that disclosure of the Department's legal advice could undermine its ability to defend its legal interests.

Balance of the public interest arguments

77. As noted above, the Commissioner accepts that there is always a general public interest in disclosure, deriving from the purpose of EIR. She also accepts that in this case there is some public interest in disclosing information to present a full picture.
78. However, in considering where the balance of the public interest lies in the circumstances of this case, the Commissioner has given due weight to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP.
79. 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.
80. Furthermore, in the circumstances of this case, the Commissioner considers that the public interest arguments in favour of maintaining the exception have been strengthened given the more recent developments with respect to legal proceedings.
81. The Commissioner therefore finds that regulation 12(5)(b) applies and that the public interest favours withholding the information.

Right of appeal

82. 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

83. 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.

84. 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

**Jon Manners
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