

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 November 2017

Public Authority: Natural England
Address: Mail Hub
Worcester County Hall
Spetchley Road
Worcester
WR5 2NP

Decision (including any steps ordered)

1. The complainant has requested information relating to Natural England entering into partnership with the British Association for Shooting and Conservation ('BASC'). Natural England disclosed some of the requested information to the complainant, however it withheld some of the requested information ('the withheld information') citing regulations 12(3) and 12(5)(b) of the EIR.
2. The Commissioner's decision is that Natural England has correctly applied the above regulations of the EIR to the withheld information.
3. The Commissioner therefore requires no steps to be taken.

Request and response

4. On 14 August 2016, the complainant wrote to Natural England and requested information in the following terms:
 - 1) In April 2015 Natural England agreed a "partnership deal" with the lobby group "British Association for Shooting and Conservation" (BASC) which promotes the interests of those who enjoy killing animals for entertainment. Who in Natural England initiated this partnership?
 - 2) Provide copies of all communication with BASC from Natural England officials (including chairman and Chief Executive) initiating this partnership.

- 3) Did the Chairman or Chief Executive of Natural England seek formal permission from parliament before establishing this partnership?
 - 4) Is there any lawful partnership arrangement/ agreement signed with BASC and if so provide copy?
 - 5) Has the Chairman or Chief Executive agreed this partnership, and if so I want the name of this person/persons?
 - 6) Natural England issued licences for 10 buzzards to be killed in August 2016. Provide copies of correspondence between Natural England and BASC (electronically and hard copy) in relation to this licence?
 - 7) How long is this "partnership deal" for? One year or indefinitely?
 - 8) Has Natural England or any official or employee received any financial or payment in kind from BASC? (include free membership, travel costs, or any free offer which has a value?)."
5. Natural England responded on 20 September 2016, providing information in response to parts 1, 2, 4 and 5 of the complainant's request. It stated that, within the documents provided, some information had been withheld, citing regulations 12(3) and 12(5)(b) of the EIR as a basis for non-disclosure. Natural England also, within that response, provided written responses to parts 3, 6, 7 and 8 of the complainant's request.
6. Following an internal review, Natural England wrote to the complainant on 9 January 2017. It stated that the reviewer was upholding the original decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled, specifically Natural England's response to parts 1, 2, 4 and 5 of his request.
8. The Commissioner has considered Natural England's application of the exceptions set out in regulations 12(3) and 12(5)(b) to the information that it has not disclosed in response to parts 1, 2, 4 and 5 of the complainant's request ("the withheld information").

Reasons for decision

Regulations 12(3)/13 of the EIR

9. Natural England redacted personal contact details of its employees from some of the information disclosed to the complainant on the basis of this exception.
10. Regulation 12(3) states:

"To the extent that the information requested 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."
11. 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."
12. 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."
13. 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.
14. 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. Natural England considers that disclosure of the information requested would contravene the first data protection principle.
15. 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..."

16. 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 (i.e. the data subject) in terms of what would happen to their personal data and the consequences of disclosing personal data, i.e. what damage or distress would the data subjects suffer.
17. Furthermore, notwithstanding the data subjects' reasonable expectations or any damage or distress 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.
18. Natural England has informed the Commissioner that the complainant has a long history of engaging with employees of Natural England in a negative and inappropriate manner. This includes the use of abusive and aggressive language towards them, which has caused great distress to some employees.
19. The Commissioner has concluded that, whilst as employees of a public sector organisation, the data subjects may have a reasonable expectation that their names and contact details would be disclosed, the circumstances of this case are such that disclosing their personal contact details publicly is likely to cause them a great deal of distress, and in the wrong hands, could potentially lead to damaging consequences.
20. The Commissioner does not consider that there is an overriding legitimate interest to the public in disclosing the personal contact details of Natural England employees in the circumstances of this case. She considers that on balance the potential distress caused by disclosure, and the data subjects' right not to have their personal contact details disclosed, outweigh any legitimate interest in disclosure.
21. She has consequently concluded that disclosure would be unfair in the circumstances of this case and therefore in contravention of the first data protection exception at regulation 12(3).

Regulation 12(5)(b)

22. All 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.

23. 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."

24. Natural England 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 advice privilege because it was created for the dominant purpose of providing and receiving legal advice.

25. 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. 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."

26. The Commissioner also shares the view that there are two types of privilege within the concept of LPP; litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice.

27. The Commissioner has inspected the information Natural England considers is legally privileged and she is satisfied that it is information in respect of which a claim to LPP could be maintained in legal proceedings. She is satisfied that the information is subject to advice privilege. The information relates to the draft partnership agreement between Natural England and the BASC, which contains comments from Natural England's in-house lawyer. There are also covering e-mails from the in-house lawyer to the client (Natural England) which also provide and refer to legal advice.

28. The Commissioner has consequently concluded that Natural England was entitled to engage the exception at regulation 12(5)(b) in respect of the information withheld on that basis.

Public interest test

29. 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 factors in favour of maintaining the exception

30. There is a general public interest inherent in this exception in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice. Anything which undermines the general principles of LPP, without special or unusual factors being present, would be likely to affect the smooth running of the course of justice, which would not be in the public interest.
31. Furthermore, Natural England argues that disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information, and disclosure of the advice would provide an indication of the arguments on the part of Natural England and their strengths and weaknesses. This would unbalance the level playing field for future partnership agreements with both BASC and other organisations. As public money is involved, anything detrimental to Natural England's ability to compete for partnership agreements on a level playing field would not be in the public interest.

Public interest factors in favour of disclosure

32. Natural England accepts that disclosure would promote openness, transparency and accountability. It acknowledges that it is a public authority and as such should be open, transparent and accountable to the public regarding its decisions.
33. 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.

34. The Commissioner also accepts that there is a strong public interest in transparency, openness and accountability on the part of public authorities with regard to their decision-making processes.
35. 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, she considers that there is a significant public interest in ensuring that the public authority is able to access full and frank advice, which in turn is fundamental to the administration of justice. Given that the withheld information is still fairly recent, disclosure is likely to severely restrict Natural England's ability to do that in future in relation to similar matters.
36. The Commissioner 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.

Right of appeal

37. 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

38. 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.
39. 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

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