

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 18 July 2019

**Public Authority:** Warwickshire County Council  
**Address:** Shire Hall  
Warwick  
CV34 4RL

#### **Decision (including any steps ordered)**

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1. The complainant has requested information with regards to a public footpath that crosses farmland. Warwickshire County Council (the council) provided the information but withheld some under regulation 12(5)(b) of the EIR – Course of Justice and 12(4)(e) of the EIR – Internal Communications.
2. During the Commissioner's investigations, the council no longer sought to rely on regulation 12(4)(e) of the EIR and provided the information that was previously withheld under that exception. It maintained its reliance on regulation 12(5)(b) of the EIR to the other withheld information.
3. The Commissioner's decision is that regulation 12(5)(b) of the EIR is engaged.
4. The Commissioner does not require the council to take any steps.

## Request and response

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5. On 15 August 2018 the complainant made the following information request to the council:

*"Any correspondence or documents received or sent in relation to the [location redacted] relating to the period 1<sup>st</sup> January 2015 to 14<sup>th</sup> August 2018.*

*My interest lies in particular to any correspondence or notes relating to the footpath as it crosses [farm redacted]."*

6. The council responded on the 21 September 2018 providing 228 pages of documents. It redacted the personal data of third parties.
7. The council withheld some information under regulation 12(4)(e) of the EIR – internal communications.
8. The complainant requested an internal review on the 27 September 2018 as she considered the all of the withheld information should be provided.
9. She also queried two missing documents from the bundle of information provided.
10. The council provided its internal review on the 17 October 2018. It upheld its decision to withhold the documents it had, but determined that of the 11 emails that had been withheld under regulation 12(4)(e), 9 of them should have actually been withheld under regulation 12(5)(b) – Course of Justice (Legal Professional Privilege) and so amended its refusal accordingly.
11. With regards to the missing documents, the council advised where the complainant could find them within the bundle of documents that had been provided in its initial response.

## Scope of the case

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12. The complainant contacted the Commissioner on 1 December 2018 to complain about the council withholding the emails it has under regulation 12(5)(b) and 12(4)(e) of the EIR. The complainant has not disputed the personal data redactions made by the council.
13. During the Commissioner's investigations the council advised the Commissioner that after a further review, there are 12 withheld emails and it is withholding:

- Emails 1 to 7, 10 and 12 under regulation 12(5)(b) of the EIR
  - Email 9 under regulation 12(4)(e) of the EIR
  - Emails 8 and 11 under both regulation 12(5)(b) and (12)(4)(e) of the EIR
14. The council then later retracted its reliance of regulation 12(4)(e) of the EIR to email 9 and provided a copy of it to the complainant on 11 June 2019, redacting only the name of a third party under regulation 13 of the EIR – personal data.
15. The Commissioner considers the scope of the case is to determine whether the council can withhold the remaining emails under regulation 12(5)(b) of the EIR.
16. If the Commissioner determines that emails 8 and 11 are exempt under 12(5)(b) of the EIR, she will not go on to consider them under regulation 12(4)(e) of the EIR.

## **Reasons for decision**

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### **Regulation 12(5)(b) of the EIR – Course of Justice**

#### Emails marked 1 to 8, 10, 11 and 12

17. Regulation 12(5)(b) of the EIR states that a public authority can refuse to disclose information if its disclosure would adversely affect the course of justice, the ability to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
18. The council has argued that this exception is relevant because the withheld information is subject to Legal Professional Privilege (LPP). The Commissioner accepts that LPP is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'. For this reason, the Commissioner has found in previous cases that regulation 12(5)(b) of the EIR will be relevant to information which attracts LPP.
19. In order to reach a view as to whether or not the exception is engaged, the Commissioner must first consider whether the withheld information is subject to LPP. She must decide whether the disclosure of the information into the public domain would have an adverse effect on the course of justice as claimed by the council.

20. The Commissioner has viewed these emails which contain the arranging (emails 3, 4 and 5), seeking (emails 2, 7 and 8) and receiving (emails 1, 6, 10, 11 and 12) of legal advice in relation to the request.
21. The Commissioner is satisfied that these emails are communications between the council's internal solicitors and officers created for the purpose of providing and obtaining legal advice.
22. The Commissioner is also satisfied that there is no evidence to indicate that the legal advice has been shared with a third party for it to have lost its confidential character.

### **Would disclosure have an adverse effect on the course of justice?**

23. The council argues that it should be able to seek and receive legal advice in relation to its functions, powers, duties or undertakings, including its role as a highway authority. It considers that disclosure would undermine the general principles of legal professional privilege and the administration of justice.
24. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (ES/2005/0023), the Information Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests". The Commissioner accepts that the disclosure of the legal advice would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer's capacity to give full and frank legal advice.
25. In consideration of the above, the Commissioner is satisfied that it is more probable than not that disclosure would adversely affect the course of justice and is therefore satisfied that regulation 12(5)(b) of the EIR is engaged in respect of the withheld emails.

### **Public interest test**

26. Regulation 12(1)(b) requires that, where the exception under the regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

### **Public interest arguments in favour of disclosure**

27. The complainant has told the Commissioner that the footpath issue has been ongoing for a long time and questions why these conversations are not being revealed when there is no pending litigation.
28. The complainant states that this information would be of interest to the community as this is in relation to a public footpath.
29. The council has told the Commissioner that it recognises the importance of ensuring that it is seen to be transparent, fair and accountable to the public.

### **Public interest arguments in maintaining the exception**

30. The council has told the Commissioner that the issues in this case are effectively dormant or "on hold" at this time however one or more of them could potentially become live again in the future.
31. The council has stated that it should be able to protect its position with the ability to seek confidential legal advice in relation to any of its functions especially if any of the issues should become live again which would place the council in an unfair position of having to disclose its own legal advice without any such disadvantage to its opponents.
32. The council considers it has made considerable efforts to be transparent and accountable in disclosing 228 pages of documents with regards to this request.
33. The council has told the Commissioner that it has also considered the administration of justice generally and not just the effect on this particular case. The council has referenced the *DCLG v the Information Commissioner & WR [2012] UKUT 103 (AAC)* in which it was stated that an "*adverse effect upon the course of justice can result from the undermining of the general principle of legal professional privilege*"
34. As already discussed, the Commissioner and Information Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice would have an adverse effect on the course of justice through the weakening of the general principle behind LPP.
35. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so, from the result of disclosure, could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.

36. The Commissioner's published guidance on LPP, the course of justice and inquiries exception<sup>1</sup> states the following:

*"In relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice."*

37. It is also important that if an authority is faced with a legal challenge to its position, it can defend its position properly and fairly without the other side being put at an advantage by not having to disclose its own legal advice in advance.
38. In light of the above, there will always be a strong argument in favour of maintaining LPP because of its very nature and the importance to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that:

*"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest... It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

39. This does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.
40. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. He also accepts there is a strong public interest where those decisions concern activities that could have significant impacts on the environment and in relation to this request.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

41. The Commissioner notes that the council has provided 228 pages of information falling within the scope of the request other than the 12 emails being withheld.
42. Having considered the above, it is the Commissioner's view that the council's right to obtain legal advice in confidence is not outweighed by or equal to the public interest in disclosure.
43. The Commissioner is satisfied that disclosure would likely affect the candour of future exchanges between the council and its legal advisers and that this could lead to advice that is not informed by all the relevant facts. In turn this would likely result in poorer decisions made by the council because it would not have the benefit of thorough legal advice.
44. The Commissioner has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure.
45. As the Commissioner has found emails 8 and 11 to be exempt under regulation 12(5)(b), she has not gone on to consider them under regulation 12(4)(e) of the EIR.

## Right of appeal

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46. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**