

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

Decision notice

Date: 18 February 2020

Public Authority: Devon County Council
Address: County Hall
Topsham Road
Exeter
EX2 4QD

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence relating to a prosecution. Devon County Council ("the Council") provided some information under data protection legislation and withheld two documents which it said would adversely affect the course of justice if disclosed. It thus relied on Regulation 12(5)(b) of the EIR to withhold the information.
2. The Commissioner's decision is that the Council has applied the exception correctly to withhold information. She also considers that the Council has identified all the information it holds, within the scope of the request, that would fall within the EIR. However, it failed to disclose all the information not covered by exceptions and failed to provide the complainant with a refusal notice stating all the exceptions on which it wished to rely, within 20 working days and thus breached Regulations 5(2) and 14(2) of the FOIA respectively.
3. The Commissioner does not require further steps.

Request and response

4. On 9 May 2019 the complainant requested information of the following description:

"Any and all communication relating to [address redacted] and/or EIA1348 between 05/03/2015 and present date 09/05/2019"

5. On 12 June 2019, the Council responded. It refused to provide the requested information and relied on Regulation 12(5)(b) of the EIR to do so.
6. The complainant requested an internal review on 12 June 2019. The Council sent the outcome of its internal review on 10 July 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 1 July 2019 to complain about the way his request for information had been handled.
8. The Commissioner noted, from the correspondence between the complainant and the Council, that the complainant was subject to a prosecution, that the address specified in his request was his home address and that the reference number contained in the request related to the prosecution case against him.
9. As a result, when opening her formal investigation on 30 September 2019, the Commissioner drew the Council's attention to these facts. She noted that, as the request primarily appeared to encompass information either about the complainant, about his home, or about a decision taken to prosecute him, there was a strong likelihood that most, if not all the information within scope would be the complainant's own personal data. She therefore advised the Council to consider responding to the request under the Subject Access provisions of the General Data Protection Regulation (GDPR) and, once that had been completed, to identify any additional information within the scope of the request and consider that under the EIR.
10. The Council issued a formal SAR response on 2 December 2019. However it withheld some documents from its response. It considered the information to attract legal professional privilege but was unclear as to whether it should consider the information under SAR or EIR.
11. The Commissioner asked to see the documents being withheld so that she could reach a preliminary view as to whether they should be considered under EIR or SAR. Having reviewed the documents, whilst they do name the complainant and do form part of a prosecution case, the Commissioner did not consider that these documents had the complainant, or the decision to prosecute him, as their main focus. She therefore considered that, appropriately redacted, the documents would not identify the complainant and would thus not be his personal data.

12. Having reached this preliminary view, the Commissioner then invited the Council to reconsider these documents again under the EIR and either disclose them or issue a fresh refusal notice.
13. The Council disclosed some of the documents to the complainant in January 2020, but withheld three documents. It cited Regulation 12(5)(b) as its reason for withholding two of the documents and Regulations 12(5)(f) and 13 for the remaining one.
14. Having reviewed the information a second time, the Commissioner considered that the third document did not fall within the scope of the request and she has thus not considered the document as part of this notice – although she considers it likely that the stated exceptions would have applied in any case.
15. The Commissioner has not considered whether the Council appropriately redacted any of the material it disclosed under SAR. Any information it held which was the personal data of the complainant would have been completely excepted from disclosure under the EIR in any case.¹
16. Having received both his SAR and EIR disclosures, the complainant considered that the Council held further information, as he had not been provided with any correspondence from a particular department of the Council. The Commissioner notes that the appropriate route to challenge the extent of personal data held by a data controller would be for the complainant to apply to her separately for an assessment under section 165 of the Data Protection Act 2018. However, she asked the Council to consider whether it held any further information which would fall within the scope of the EIR. As a result of these searches, the Council identified a small quantity of further information which it disclosed to the complainant as part of its SAR response.
17. The Commissioner therefore considers that the scope of her investigation is to:
 - a. Establish whether the Council has identified all the information it holds which is not the complainant's own personal data.
 - b. Determine whether the Council was entitled to rely on Regulation 12(5)(b) to withhold information.
 - c. Address the procedural handling of the request.

¹ Regulation 5(3) of the EIR provides an absolute exception from disclosure of any information which is the personal data of the person requesting it.

Reasons for decision

Is the requested information environmental?

18. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*
19. As it is information relating to a prosecution for breach of a Stop Notice issued under the Environmental Impact Assessment (Agriculture) (England) Regulations 2008 and contains various references to the state of the landscape and to agricultural practices, the Commissioner considers that the withheld information falls within categories (a), (b) and (c) of the above definition. It is thus environmental information and the Council was correct to deal with the request under the EIR.

A) Has the Council all relevant information within the scope of the EIR?

20. Regulation 5(1) states that: "*a public authority that holds environmental information shall make it available on request.*"
21. The Council informed the Commissioner that, during the course of her investigation it carried out searches of documents held by its Historic Environment Team as this was the team most closely involved with the complainant. However, the complainant alerted the Council, via the Commissioner, to the fact that none of the correspondence he had received related to the North Devon Coast Areas of Outstanding Natural Beauty (AONB) partnership – hosted by the Council. Further searches amongst this team elicited some further information which, again, was the complainant's own personal data.
22. The Council noted that it had searched its electronic records using the complainant's name, the name of his property, the name of local area and the prosecution reference number as keywords. It was confident that it had now identified all relevant information.
23. The Commissioner is satisfied that the Council has carried out searches which are both appropriate and adequate. On the balance of probabilities, she considers that the Council does not hold any further information within the scope of the request.
24. The Commissioner is keen to stress that most of the information complainant has received during this investigation has been disclosed under Data Protection legislation as it is his own personal data. Only two documents fall outside the scope of data protection legislation. The Commissioner therefore considers that, even in the unlikely event that further information was held, it would be the complainant's personal data (and thus excepted from disclosure under the EIR anyway).
25. If the complainant is not content that the Council has complied with Data Protection legislation, it is open to him to request an Assessment from the Commissioner under data protection legislation.

B) Regulation 12(5)(b) – Adverse effect on the course of justice

26. Regulation 12(5)(b) states that:

"a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

- (b) 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..."*

27. The Commissioner's public guidance on this exception² explains that she accepts the exception is designed to encompass information that would be covered by legal professional privilege.
28. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the First-tier Tribunal (Information Rights) ("the Tribunal") highlighted the requirement needed for this exception to be engaged. It has explained that there must be an 'adverse' effect resulting from disclosure of the information, as indicated by the wording of the exception. In accordance with the Tribunal decision of *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word 'would' is 'more probable than not'.
29. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Tribunal described legal professional privilege as 'a fundamental condition on which the administration of justice as a whole rests'. The Commissioner accepts that disclosure of 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 and would discourage people from seeking legal advice.
30. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between advisor and client in a relevant legal context will therefore attract privilege.

Does the withheld information attract privilege?

31. The withheld information in this case consists of two documents. One is a draft of a witness statement made by an employee of the Council ("the Witness"). "Tracked changes" are visible in the document, showing

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

where a particular individual has commented on and suggested changes to, the original statement. The other is the covering email to which the first document appears to have been attached. This email was sent, by a solicitor from a private law firm, to an employee of Natural England and was clearly intended to be shared with the Witness. The email contains responses to questions posed about the content of the witness statement and the manner in which evidence might be adduced at any eventual trial.

32. The Council argued that:

"This correspondence consists of legal advice from solicitors regarding upcoming litigation which has yet to commence. It includes opinions from solicitors regarding the importance of certain elements of evidence that will be referenced in these proceedings and outlines legal opinions regarding who might be called as witnesses in the case in question.

"The council believes that disclosure of this advice into the public domain would reveal information that could be used to derive the prosecution's legal strategy in advance of the court case. The council argues that disclosure of this information would therefore have an adverse effect on the ability of the prosecution to develop and implement this strategy. In addition, disclosure would have the effect of revealing the details of the prosecution's case, including any tactical strengths or weakness of the evidence into the public arena, that could therefore be used by the defendant to undermine the prosecution case in court. The council contends that this would be unfair and would prejudice a fair trial."

33. The Commissioner notes that the email was sent by a professional solicitor (the legal advisor) to Natural England (the client). Natural England would be the prosecuting authority where an offence of this kind goes to trial.

34. It is clear from the content of the email that it has been sent for the "dominant purpose" of providing legal advice to the client. This is because the email offers advice and opinions about how a future trial should be conducted and what Natural England would require from potential witnesses.

35. The draft document was attached to this email. In itself, that does not make the document privileged, but the tracked changes form part of the overall communication as they are referenced within the covering email. The annotations on the comments and the wording of the covering email demonstrate that the changes that have been suggested have been suggested by the external solicitor. Whilst many of the changes relate to

formatting suggestions, they are nevertheless the recommendation of the external solicitor.

36. The Commissioner is therefore satisfied that the two documents form part of a single communication between a professional legal advisor and their client for the dominant purpose of providing advice on litigation which was being contemplated. She is therefore satisfied that both documents will attract privilege.

Would disclosure adversely affect the course of justice?

37. The Upper Tribunal in *DCLG v The Information Commissioner & WR* [2012] UKUT 103 (AAC) ruled that disclosure of information which would attract litigation privilege need not be shown to adversely affect the particular contemplated litigation for the exception to be engaged. It is sufficient to demonstrate that general principle of legal privilege would be undermined.
38. Disclosure of information of this kind, would, in the Commissioners view undermine the general principle of legal professional privilege. Public authorities need a protected space in which they can seek professional legal advice about their actions or proposed actions. Equally, professional legal advisors need to have confidence that they can have full and frank discussions with their clients without the risk of that information becoming public knowledge.
39. In this particular case, the Commissioner accepts that there would be a specific adverse impact on the particular litigation being contemplated. The complainant would, if given access to this information, be able to derive or deduce information about the prosecution's strategy – and thus be able to undermine it.
40. In addition, whilst material such as witness statements might be available to the defendant in a criminal trial via the discovery process, disclosure under the EIR is disclosure to the world at large. It is the equivalent of publishing the information on the Council's website.
41. It is entirely possible that, were the information to be disclosed under the EIR, it could come to the attention of potential jurors or other witnesses. Jurors would thus have had prior access to information that might or might not be introduced during the course of trial. Witnesses who testify at the trial, would potentially have (or be accused of having had) their evidence "tainted" because they knew what another witness had said, or was planning to say.
42. Having considered the matter, the Commissioner accepts that disclosure of the withheld information would adversely affect the course of justice by undermining legal privilege and by affecting the ability, of the

complainant, to receive a fair trial. She thus concludes that Regulation 12(5)(b) is engaged.

Balance of the public interest

43. The Commissioner agrees with the Council that there is always in inherent public interest in transparency and in understanding how organisations are spending taxpayers' money.
44. Equally, she also agrees with the Council that there is a very strong public interest in maintain the integrity and effectiveness of the justice system.
45. Having already determined that disclosure of the information would adversely affect the course of justice, the Commissioner considers that she would need to see a strong public interest to justify disclosure of the withheld information.
46. In this particular case, the complainant, for reasons which are entirely understandable, has a strong personal interest in acquiring the withheld information. However, the Commissioner can see no wider public benefit to the information. Indeed, she considers that there is a substantial benefit to the wider public in the justice system being allowed to go about its work unhindered.
47. Whilst the public interest in maintaining the exception in relation to the document with tracked changes, because of the relatively anodyne nature of those changes, is weaker than for the covering email, the case for disclosure is also weaker because the principle of privilege would be undermined for the sake of a small quantity of information which would be of little use.
48. The Commissioner is therefore satisfied that the public interest favours maintaining the exception.

Presumption in favour of disclosure

49. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner & Government Legal Department* [2019] UKUT 247 (AAC), "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations*" (paragraph 19).

50. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(b) was applied correctly.

C) Procedural Matters

51. Regulation 5(2) states that such information shall be made available "as soon as possible and no later than 20 working days after the date of receipt of the request."

52. Regulation 14 of the EIR states that:

- (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*
- (2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*
- (3) The refusal shall specify the reasons not to disclose the information requested, including—*
 - (a) any exception relied on under regulations 12(4), 12(5) or 13; and*
 - (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).*

53. Whilst the Council did respond to the original request within 20 working days, it subsequently identified a small quantity of information which fell under the EIR. It disclosed most of this information, but relied on Regulation 13(1) of the EIR to redact some personal data and thus had to issue a fresh refusal notice. The Commissioner therefore finds that the Council breached both Regulation 5(2) and Regulation 14(2) of the EIR in responding to the request.

Right of appeal

54. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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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