

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

### **Decision notice**

**Date:** 29 January 2020

**Public Authority:** Bracknell Forest Council  
**Address:** Time Square  
Market Street  
Bracknell  
Berkshire  
RG12 1JD

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

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1. The complainant has requested correspondence between specific email addresses from named councillors at Bracknell Forest Council ("the Council") that refer to a wall being built. The Council provided some information but withheld one specific email under regulation 12(5)(b) of the EIR – adversely affect the course of justice – since it considered that the email was covered by legal professional privilege.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(b) of the EIR to the withheld information and that the balance of the public interest lies in the exception being maintained.
3. Therefore, the Commissioner requires no steps to be taken.

#### **Background to the complaint**

4. The matter in question concerns a wall which is owned by the Council but adjoins privately owned properties. A tree behind the wall spread its roots, pushing some of the wall out.
5. A resident started to rebuild the wall and asked the Council to provide some bricks so that he could finish off the wall.

6. The Council explained that under its procurement rules, it has a lead contractor for building works. This contractor sourced a local builder from an approved list, who charged the Council £1500. The Council was satisfied that the amount charged was reasonable.
7. As was widely reported at the time, residents were unhappy with the amount that had been charged and dissatisfied that the Council did not permit the one resident to complete the task.

## **Request and response**

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8. On 25 October 2018, the complainant wrote to the Council and requested information in the following terms:

*"Dear Bracknell Forest Borough Council,*

*Please send a copy of all emails from the following Bracknell Forest Borough Council addresses that mention either 'Melrose', 'bricks', 'Finney UK', 'Kier', 'wall', at any point between the dates of August 5 2017 and October 25, 2018:*

[Named Person] - [[email address](#)]

[Named Person] - [[email address](#)]

[Named Person] - [[email address](#)]

[Named Person]- [[email address](#)]

[Named Person] - [[email address](#)]

*Chief Executive Timothy Wheadon - [[email address](#)]"*

9. The Council responded on 23 November 2018. It stated that it had exceeded the statutory number of hours answering questions regarding the cost and quality of work for the wall. It also advised that the request was vexatious.
10. Following an internal review, the Council wrote to the complainant on 21 December 2018. It stated that it upheld its original position.

## **Scope of the case**

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11. The complainant contacted the Commissioner 7 January 2019, to complain about the way his request for information had been handled.
12. During the Commissioner's investigation, she advised the Council that the request should be considered under the EIR, due to the information requested being on a measure which is likely to affect the elements and factors of the environment.

13. On 15 May 2019, the Council informed the complainant that it had changed its position and was considering the request under the EIR, specifically regulation 12(4)(b) – manifestly unreasonable on grounds of cost owing to the amount of information held.
14. Whilst the Commissioner was reviewing the case, she asked the Council further questions regarding the amount of emails held and for evidence of a sampling exercise.
15. The Council responded, advising that it had revisited the request and found that it could provide some of the requested information as it would not exceed the statutory number of hours.
16. On 3 July 2019, the Council revised its position and provided some of the requested information. However, it advised the complainant that it was withholding some information under regulation 13 – personal information – and regulation 12(5)(b) – adversely affect the course of justice (due to legal professional privilege).
17. The complainant contacted the Commissioner again on 11 September 2019 asking for the case to be continued as he was unhappy with the Council's updated response. Specifically, while he was aware that personal information would need to be redacted, he wished to challenge the Council having redacted one email in its entirety under regulation 12(5)(b).
18. Therefore, the Commissioner considers that the scope of this case is to determine if the Council has correctly applied regulation 12(5)(b) to the requested information.

## **Reasons for decision**

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### **Regulation 12(5)(b) – the course of justice**

19. 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.
20. The Council has argued that this exception is relevant because it considers that the withheld information is covered by Legal Professional Privilege (LPP).
21. 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.

22. In order to reach a view as to whether the exception is engaged, the Commissioner must first consider whether the withheld information is subject to LPP.
23. The Commissioner has viewed the specific email in question. The Commissioner is satisfied that this email is communication from the Council's solicitor, providing legal advice to its officers.
24. 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 the confidentiality that is attached to it.
25. Having considered the Council's arguments and referred to the withheld information and publicly available information, the Commissioner is satisfied that the legal advice provided remains confidential and subject to LPP.

### **Adverse effect**

26. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It 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".
27. The Commissioner is of the view that disclosure of information subject to LPP will have an adverse effect on the course of justice. She considers the likelihood of this happening to be more probable than not. Having regard to the council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged.
28. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and therefore finds that the exception at regulation 12(5)(b) is engaged. She has therefore gone on to consider the public interest test.

### **Public interest test**

29. 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.

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

30. There is always a public interest in a public authority being transparent in the way that it conducts its business.
31. The complainant has told the Commissioner that, in his view, some information previously provided contradicts the official statements given by the Council regarding the wall in question. He considers that the withheld information would be of interest to local residents, who consider that the Council had not taken in to account the work undertaken by one of the residents.
32. In his view, the issue has not been resolved and the release of the email in question would help to clarify the issue.

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

33. The Council has explained that it believes that, should the advice it received be released, it could fuel more requests of a similar nature, which it feels have already been fully responded to.
34. It also advised that it considers the public interest would lie in favour of senior members not being overwhelmed by future requests for information protected by legal privilege, but, rather, being able to exercise their public duties effectively.
35. The Council explained that it had been transparent with information about the wall and that it believes the exception should be maintained, as it had disclosed the information which it was able to. It considered that the matter needed to be brought to a close.
36. In addition, the Council's view is that 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, as a result of disclosure, could affect the free and frank nature of future legal exchanges or may deter them from seeking legal advice.

### **Balance of the public interest test**

37. The Commissioner's published guidance on the course of justice exception<sup>1</sup>, including its relevance to LPP, 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."*

38. 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. It should also feel free to seek legal advice as to a general course of action.
39. 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<sup>2</sup> 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..."*

40. This does not mean that the counterarguments 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. The Commissioner has considered the balance of the argument below.
41. The Commissioner appreciates that, in general, there is a public interest in public authorities being as accountable as possible in relation to their decisions. She also accepts there is a strong public interest where those decisions concern activities that could have significant impact on the environment and wider community.

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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)

<sup>2</sup>

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

42. The Commissioner is satisfied that disclosure of legally privileged information would likely affect the candour of future exchanges between the Council and its legal advisers, which could lead to poorer decisions being made by the Council because it would not have the benefit of thorough legal advice.
43. In this case, the Commissioner is aware that the key issue – that of the Council's expenditure in re-building the wall – is already in the public domain and has indeed been widely reported. The Commissioner's view is that disclosing the withheld email would not add anything significant to the public debate and its contents are not of sufficient importance to overturn the strong public interest in maintaining the principle of LPP.
44. 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.
45. She has therefore determined that the balance of the public interest lies in the exception being maintained.

### **Regulation 12(2) – presumption of disclosure**

46. 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* (SGIA/44/2019), "*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).
47. 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.

## Right of appeal

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48. 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)

49. 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.

50. 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**