

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

**Date:** 21 January 2020

**Public Authority:** Bolton Council  
**Address:** Town Hall  
Bolton  
BL1 1RU

**Decision (including any steps ordered)**

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1. The complainant has asked Bolton Council for copies of the highway inspection records, records of complaints and other associated information, for an identified section of highway during a two-year period. Bolton Council refused to comply with the complainant's request in reliance on Regulation 12(5)(b) of the EIR, on the grounds that disclosure of the information would adversely affect the course of justice.
2. The Commissioner's decision is that Bolton Council has correctly applied the exception to disclosure provided by Regulation 12(5)(b).
3. The Commissioner requires no further action in this matter.

**Request and response**

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4. The complainant wrote to the Council on 28 June 2018, submitting the following request for recorded information:

"[A named person] v British Telecommunications plc

I am instructed on behalf of British Telecommunications plc in connection with a personal injury claim being brought by the above named Claimant for personal injuries sustained following an alleged accident on [date] on Upper Market Street at the junction with Carlton

Street, Farnworth.

To assist me with my investigations, and in accordance with the Freedom of Information Act 2000, I require copies of the highway inspection records together with all opening/closing notices, defect notices and records of complaints for 2 years prior to 12 June 2019. Please also provide a copy of the first post-accident highway inspection record relating to the alleged accident location.”

5. The Council responded to the complainant on 4 July 2019, by refusing her request in reliance on Regulation 12(5)(b) of the EIR. The Council did not explicitly confirm whether it holds the information but did state that its release into the public domain could facilitate false claims and therefore it considered that Regulation 12(5)(b) is engaged.
6. Having first referred the matter to the Information Commissioner’s Office, the complainant wrote to the Council on 31 July 2019 to request an internal review of its decision to withhold the information she seeks.
7. On 2 August 2019, the Council wrote to the complainant to advise her of its internal review decision. The Council upheld its application of Regulation 12(5)(b) and provided the complainant with the factors it had considered in respect of the public interest. The Council also advised that “the more appropriate way to obtain such information would be under the Civil Procedure Rules”.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 12 August 2019 to complain about the way her request for information had been handled.
9. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Bolton Council has handled her request in accordance with the EIR and specifically whether the Council is entitled to rely on Regulation 12(5)(b) of the EIR as a basis for refusing to provide the withheld information.

### **Reasons for decision**

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10. 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 –

(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;”

11. In this case, the Council has advised the Commissioner that it relies on Regulation 12(5)(b) on the grounds that disclosure of the information requested by the complainant would adversely affect the course of justice.
12. The Council has made clear that it does not rely on legal professional privilege or that disclosure would adversely affect an inquiry.
13. There is no definitive list of circumstances where a public authority may apply the exception provided by Regulation 12(5)(b). In *Rudd v the Information Commissioner & the Verderers of the New Forest (EA/2008/0020, 29 September 2008)*, the Information Tribunal commented that, ‘the course of justice’ does not refer to a specific course of action, rather, it is “a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’”.
14. The Council has advised the Commissioner that there is no road named Market Street as referenced by the complainant in her request. The Council has identified a different location which it believes is where the incident occurred in Farnworth.
15. The Council has sent the Commissioner a copy of the information it holds which it considers is relevant to the complainant’s request. It is that information which is the subject of the Council’s application of Regulation 12(5)(b) of the Environmental Information Regulations.
16. The Council considers that it has properly applied Regulation 12(5)(b) to the withheld information because it is information which is available to the complainant through an application in civil proceedings. It takes the view that the complainant is using the EIR to circumvent the normal civil procedure rules for discovery on cases going before a court. It has advised the Commissioner that disclosure of information relevant to a court proceeding is covered by part 36 of the Civil Procedure Rules and it is under this rule a court would decide whether or not information is relevant to the proceedings.
17. The Council argues that placing information into the public domain via an EIR request would be outside of the legal process and would likely be unfair. The Council says that disclosure under the EIR could undermine court proceedings and the rights of the parties to a fair trial. It believes that the disclosure of the withheld information would have an adverse effect on the course of justice because it would undermine the process of law.

18. The Council asserts that any information which the complainant would need in connection with a claim would already be made available through the court processes by way of the Civil Procedure Rules. It argues that the EIR should not be used to undermine the jurisdiction of the Civil Procedure Rules.
19. Additionally, the Council argues that a disclosure of the information which the complainant seeks would be likely to provide data which would be of assistance to potential fraudsters to make fraudulent claims against the Council. The Council contends that the dates of safety inspections and complaints are used for the purposes of validating claims and therefore, public disclosure of safety inspection dates could facilitate fraudulent claims.
20. The Commissioner has considered the Council's representations in this matter. She makes the point that, in most cases, public authorities are required to be blind to the identity of the requestor and likewise it should not consider the requestor's motives in making their request. The important question for the Commissioner's consideration is whether a disclosure of the requested information to the 'whole world' would adversely affect the course of justice. It is not simply a matter which solely concerns the complainant, or the alleged incident referred to in her request.
21. Nonetheless, the Commissioner's guidance on Regulation 12(5)(b) recognises that the civil procedure rules provide an access regime for court or tribunal records. The same guidance acknowledges that circumventing the jurisdiction of the appropriate court procedures by allowing access to court records under the EIR has the potential for adversely affecting the course of justice. This is because of the expectation that the parties involved in judicial proceedings will only be party to information disclosed under the appropriate rules.
22. The Commissioner considers that disclosure of the requested information under the EIR rather than under the civil procedure rule has the potential to undermine the public's confidence in the judicial system and might prejudice a particular on-going case.
23. The Council has argued that the information requested by the complainant would assist potential in making fraudulent claims against the Council.

24. Based on a previous case<sup>1</sup>, the Commissioner is aware that, to bring a claim against a Council for poorly maintained highways, a claimant must provide details of the particular highway, evidence of any damage sustained and the date or short time frame when the damage is thought to have occurred.
25. The Commissioner must recognise the significance of the dates of the safety inspections and records of complaints during the period specified by the complainant. She considers that the disclosure of that information would potentially facilitate the making of fraudulent claims against the Council as it would highlight if and when the Council had identified problems with the particular road but had not had the opportunity to repair them. Clearly, making the public aware of the periods when the road had not been repaired would likely assist wrongdoers in making fraudulent claims.
26. In the Commissioner's opinion disclosure in this case would present a significant risk of fraudulent claims being made against the Council. This is because the complainant seeks information which covers two years in the recent past.
27. The Commissioner must consider the circumstances which prevailed at the time the Council made its decision to withhold the information the complainant has asked for. That said, the Commissioner understands that claims for damage may be made up to six years after an alleged incident and therefore it would still be possible for wrongdoers to make false claims.
28. In consideration of the above, the Commissioner is satisfied that the information requested by the complainant engages the exception to disclosure provided by Regulation 12(5)(b) of the EIR. Notwithstanding this, the Commissioner must now go on to consider the public interest to determine whether the Council is entitled to continue to withhold the information it holds.
29. The Commissioner recognises that there is always a general public interest in the disclosure of environmental information.
30. Disclosure of environmental information promotes transparency and increases the accountability of public authorities in respect of their decision making, and their compliance with their statutory duties.

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<sup>1</sup> FER0611819

Ultimately, disclosure of environmental information supports the public's right to live in a safe environment.

31. The Commissioner also recognises that it is in the public interest to ensure those who have sustained damage from defects have the appropriate information available to them in order to hold the Council to account. In this case, disclosure would provide transparency in respect of any actions taken by the Council which concerns the maintenance and safety of the road system in its area, and particularly at the location which the Council believes is the focus of the complainant's request.
32. Weighed against the above is the real potential for the information to be used for fraudulent claims. Furthermore, the disclosure of the requested information would likely hinder the Council in tackling fraud, and this could diminish its ability to protect the public purse from fraudulent claims.
33. The Commissioner must give weight to the fact that the Civil Procedure Rules provide an alternative and appropriate regime to access information relevant to a particular claim, where a genuine claimant will not be disadvantaged due to them not being able to obtain information under the EIR.
34. The Commissioner accepts that a court may consider that some of the withheld information should not be disclosed under the normal disclosure rules. That said, the Commissioner considers that a disclosure under EIR could undermine the decision of the court.
35. Although disclosure of some of the withheld information may be in the public interest, the Commissioner considers the weight of this is reduced given there is an avenue available to genuine claimants which provides redress for damage caused by highway defects. The Commissioner has therefore decided that the public interest in maintaining the exception outweighs the public interest in disclosure.
36. 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. In its decision in *Vesco v Information Commissioner* (SGIA/44/2019), the Upper Tribunal identified a three-part test to ensure that Regulation 12(2) presumption is properly considered. The test is in this case is:
  - Would disclosure of the requested information adversely affect the course of justice? (Regulation 12(1)(a);
  - Does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b);

- Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2)).
37. The Upper Tribunal added, "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).
38. Here, the Commissioner has considered the presumption in favour of disclosure provided by Regulation 12(2). That presumption effectively requires the requested information to be disclosed unless the weight of the public interest in favour of withholding it is significantly greater. In this case, the Commissioner is satisfied that the public interest in maintaining the exception provided by Regulation 12(5)(b) is significantly greater than that which favours the disclosure of the requested information.
39. The Commissioner's decision is that the Council is entitled to rely on Regulation 12(5)(b) of the EIR in respect of the complainant's request.

**Right of appeal**

40. 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)

41. 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.
42. 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  
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Cheshire  
SK9 5AF**