

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 9 December 2021

Public Authority: Warwickshire County Council

Address: Shire Hall
Market Place
Warwick
CV34 4RL

Decision (including any steps ordered)

1. The complainant requested information held by Warwickshire County Council (the council) relating to a particular village green.
2. The Commissioner's decision is that the council is correct to state that it did not hold information relevant to part 1 of the complainant's request. She is also satisfied that the council is entitled to rely on regulation 12(5)(b) of the EIR (course of justice), when withholding information relevant to part 2 of the request.
3. However, the Commissioner has found the council to be in breach of regulation 9 of the EIR, as it failed to provide appropriate advice and assistance to the complainant.
4. Furthermore, as the council failed to provide some of the information, and also its refusal notice, within 20 working days, the Commissioner has also found there to be a breach of regulation 5(2), and regulation 14(2), of the EIR.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

6. On 28 December 2019, the complainant wrote to the council and requested information in the following terms:

I would like to request a copy of the following information:

- *A copy of the report produced by the legal department for Mr Tompkins (see email trail below). This report investigates the claim that WCC gave permission to a member of the public that directly resulted in criminal damage to Burmington Village Green. This report was commissioned on or around July 2019.*
- *Any reports, emails, memos, briefing papers or other internal correspondence sent by anyone in the legal department July 2019 onwards to any Director or Assistant Director that mentions Burmington Village Green.*

For context:

- *I am interested in any investigations and/or conclusions regarding the criminal damage to Burmington Village Green following an application to tarmac the village green received by WCC on 24th April 2018. WCC carried out a full investigation but have not released details of the investigation or its conclusion.*
7. On 14 April 2020, the council provided its response to the complainant's request. With regard to the first bullet point (part 1) of the request, it advised that a copy of the report did not exist, and therefore was not held.
8. The council provided the complainant with copies of two emails that it stated were relevant to bullet point 2 (part 2) of the request. It advised that seven further emails were to be withheld under regulation 12(5)(b) of the EIR. It went on to confirm that the public interest lay in favour of withholding such information.
9. On 26 April 2020, the complainant requested an internal review, and on 27 May 2020, the council provided its response.
10. With regard to part 1 of the request, the council confirmed again that the report was not available at the time of the request. It went on to say that it '*remains its intention*' to provide a copy of the report '*once it has been concluded and issued.*'

11. With regard to part 2 of the request, the council maintained its previous position, providing further detailed explanations to the complainant as to why it regarded the exception at regulation 12(5)(b) to be engaged.

Scope of the case

12. The complainant initially contacted the Commissioner on 1 April 2020, as he had not received a response to his request. He then raised concerns about the response he did receive from the council.
13. The Commissioner is to examine:
 - whether the council was correct when it stated that it did not hold information relevant to part 1 of the request.
 - whether the council was entitled to rely on regulation 12(5)(b) when withholding information relevant to part 2 of the request.
 - certain procedural matters.

Reasons for decision

Regulation 5(1) - duty to make information available Regulation 12(4)(a) - information not held

14. Regulation 5(1) of the EIR states that, subject to other provisions, a public authority that holds environmental information shall make it available on request. Regulation 12(4)(a) provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
15. The complainant has raised concerns about the council's response to part 1 of his request. He has provided a copy of an email that he received from an officer at the council on 1 June 2020; this confirmed that the relevant report was, at that time, with an Assistant Director for consideration. Given the short space of time between this correspondence, and the internal review response (27 May 2020), the complainant is particularly concerned that there may have been a deliberate attempt by the council to mislead the public about the information which it held at that time.
16. The council has provided the Commissioner with copies of a number of drafts of the report relevant to part 1 of the request, the first of which appears to have been created on 25 May 2020.

17. The council states that whilst it was correct to have advised the complainant that no report existed at the time of the request, it accepts that its internal review response should have explained that a draft version dated 25 May 2020, did now exist.
18. The council is only required to consider the information that was held at the time of the request. It appears that no report existed at that time; therefore, at the internal review stage of the process, the council was under no obligation to consider whether it should release the draft copy that it now held. Given this, the Commissioner is satisfied that the council's response to part 1 of the complainant's request was correct, in that the information was not held at the time of his request.
19. However, regulation 9¹ of the EIR (advice and assistance), requires public authorities to provide reasonable advice and assistance to individuals making (or proposing to make) information requests.
20. The Commissioner regards the council's failure to confirm within its internal review response that a draft copy was now held to be a breach of regulation 9 of the EIR. It is likely that had it confirmed this to the complainant at that time, the subsequent ambiguity and mistrust that arose about when this report first existed may have easily been avoided.

Regulation 12(5)(b)-the course of justice

21. Regulation 12(5)(b) provides an exception from the obligation to disclose environmental information which 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.
22. The course of justice element of the exception is broad in coverage and encompasses, for example, information subject to legal professional privilege (LPP) and information about investigations or proceedings carried out by authorities.
23. The council has argued that the withheld information relevant to part 2 of the request is subject to LPP, and that its disclosure would adversely affect the course of justice. It has also confirmed that the advice has not been disclosed externally, or otherwise treated in any way that has

¹ [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

waived the privilege. It maintains that the confidentiality attached to the withheld information has therefore not been lost.

24. Having considered the third bullet point of the complainant's request, which he stated provided context to his request, it is the Commissioner's opinion that some of the information supplied by the council for her consideration does not fall within the scope of the request, as it was not what he stated that he required.
25. With regards to that information which has been withheld that is relevant to the request, the Commissioner is not persuaded that this would all be subject to LPP. However, this does not necessarily negate such information from being captured by the exception at regulation 12(5)(b).
26. The wording of the exception has a broad remit encompassing any adverse affect on the course of justice generally; this allows for information that is not subject to LPP to still be covered by regulation 12(5)(b), as long as disclosure would adversely affect the course of justice.
27. The Commissioner is therefore mindful that in a case such as this, the application of the exception can be based on the more generic concept of the '*smooth running of the wheels of justice*', as envisaged in the Tribunal case of '*Rudd v the Information Commissioner & the Verderers of the New Forest, EA/2008/0020*'. ²
28. The Commissioner regards it to be the case that the withheld information provides details of the consideration given by the council on matters associated with the planning consents for works that were carried out on the village green.
29. In addition, it is the Commissioner's view that the communications not subject to LPP contribute to, and have an impact on, legal advice which was given.
30. The Commissioner has also taken into account the comments made by the Tribunal in the case of '*Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48*'³. Whilst in that case the Tribunal accepted that there was no legal process

² [IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL \(tribunals.gov.uk\)](https://tribunals.gov.uk)

³ <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

involved to which the information was relevant, the advice was still regarded to have a legal function; it was about whether the Bank of England had properly discharged its functions under banking laws and about the potential public law remedies for challenging any unfavourable findings.

31. Having considered the Tribunal's comments in the 'Three Rivers District Council' case, the Commissioner is satisfied that the withheld information is held for the purpose of discharging the council's statutory functions in relation to matters connected to planning (permissions to carry out works on a particular piece of land).
32. Given the above, the Commissioner concludes that the withheld information that falls within the scope of the request is relevant to the '*smooth running of the wheels of justice*' described in paragraph 27 of this decision notice and, as such, falls within the scope of the exception. She must now consider whether disclosure of the information would result in an adverse effect to the course of justice.

Adverse effect

33. The Commissioner is mindful that whilst there may not have been a legal dispute at the time of the request, it is potentially a matter which could have been subject to such dispute at a later date (and may possibly still be). The fact (as far as the Commissioner is aware) that no legal action is associated with the consent to give planning, and the works that were subsequently carried out does not, in the Commissioner's view, diminish the level of harm that would be caused by the disclosure of the withheld information in this instance.
34. In addition, the Commissioner also considers it to be the case that disclosure of the information would provide external parties with an insight into open and frank discussions that took place about the council's position. Furthermore, it is pertinent to note that it would involve public access to privileged information at a time when matters were still 'live'.
35. Taking all factors into account, the Commissioner is satisfied that, in this instance, it is more probable than not that disclosure of the withheld information would adversely affect the course of justice, and she finds that the exception at regulation 12(5)(b) is engaged.
36. As regulation 12(5)(b) is subject to a public interest test, the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

37. The Commissioner regards it to be of primary importance that the council has the opportunity to consider its position without outside interference. She considers that the disclosure of the withheld information would provide external parties with an insight into open and frank discussions that took place about the council's position in relation to the village green. In the Commissioner's view, there is a realistic possibility that disclosure would have an adverse effect on the council's ability to conduct its decision making without interference, and that it would hinder its ability to properly discharge its statutory obligations.
38. Taking all relevant factors into account, the Commissioner has concluded that, in this case, it is more probable than not that disclosure of the information relevant to part 2 of the request would result in adverse effects to the course of justice.
39. Therefore, the Commissioner finds that the exception at regulation 12(5)(b) is engaged. She has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure in this case.

Public interest in disclosure

40. The Commissioner acknowledges regulation 12(2), which provides that a public authority shall apply a presumption in favour of disclosure.
41. The Commissioner considers that there is a strong public interest in disclosing information that allows scrutiny of a public authority's actions and decisions. Her view is that it helps create a degree of accountability and enhances the transparency of the process through which such disclosures are arrived at. This, in turn, can help to increase public understanding, trust and participation in the decisions taken by public authorities.
42. The complainant has argued that there is a great deal of community interest in the issues relating to the village green, and that his request has the support of other members of the parish. He goes on to say that interest on the issue extends beyond the local area, and that the outcome of the dispute has wider implications, affecting other village greens in the county.
43. The council has said it understands the importance of ensuring that it is transparent, fair and accountable to the public for the way in which it conducts itself and carries out its functions. It also states that it recognises the considerable local interest in the matters which relate to the relevant village green.
44. The council has also said that it has taken into account that the '*Parish Meeting*' continues to be concerned about the permitted works on the

village green. Furthermore, the council states that it has considered the fact that claims have been made that the planning permissions were 'illegal', and that there has been a 'cover up' by the council; it has said that it is mindful that such concerns may be allayed by allowing access to the confidential discussions that have taken place behind the scenes.

Public interest in maintaining the exception.

45. The Commissioner notes that the public interest inherent in the exception at regulation 12(5)(b) will always be strong due to the fundamental importance of the general principle of upholding the administration of justice. Central to this is the importance of the principle enshrined in LPP.
46. The council has provided a number of arguments in support of the public interest in maintaining the exception. This includes the importance of being able to protect its position with regard to its ability to seek confidential legal advice in relation to its functions. It has also referred to the weakening of confidence in legal professional privilege, should the information be disclosed, advising that it is aware that this is a factor that the ICO's guidance states carries considerable weight in support of maintaining the exception.
47. The council has argued that it would face some difficulties if its officers could not freely seek, and its legal advisers could not freely give, legal advice. It states that it gave some weight to the importance of legal professional privilege being a '*fundamental condition on which the administration of justice as a whole rests*': '*Reg v Derby Magistrates Court, Ex parte B*[1996] AC 487.
48. The council also states that, in this particular case, the advice was recent, and still very much '*live*', at the time of the request. It goes on to say that should any proceedings have commenced in relation to the village green works, it would have placed the council in an unfair position of having had to disclose its own legal advice in relation to the works without any such advantage to its opponents, and that this tips the balance in favour of maintaining the exception.

Balance of the public interest

49. The Commissioner appreciates that, in general, there is a public interest in public authorities being as transparent and accountable as possible in relation to their actions. She recognises that there may be a need for enhanced transparency and scrutiny of decision making in planning cases, particularly where decisions have a significant impact on the local community. The Commissioner is also mindful that regulation 12(2)

requires the public authority to apply a presumption in favour of disclosure.

50. In this instance, the Commissioner is of the opinion that disclosure would enable the public to have greater insight into the legal advice that was sought and received, and the council's position. This would serve the public interest as it would demonstrate that proper processes were followed.
51. It is apparent to the Commissioner that the matter to which the request relates has generated considerable local interest. There were concerns that the council had potentially erred in law by providing planning consent for the works to be carried out on the village green, and that it had not been sufficiently open and transparent about the decisions that had been made. The Commissioner believes that the seriousness of the matter at hand is highlighted by the initiation of an investigation into the decision made to allow planning, which then led to the legal officer report that is referred to in the complainant's request.
52. The Commissioner also acknowledges that the disclosure of the withheld information would provide further transparency into the reasons why certain decisions were reached by the council. It may also go some way towards resolving any ambiguity which may exist, and rebuilding any lost confidence that exists about how the council has handled both this, and associated, matters. The Commissioner also accepts that there is always some public interest to be associated with planning issues, and in particular, with the local community.
53. However, whilst the Commissioner recognises there is a specific public interest weighting in favour of disclosure in this case, she must weigh this against the broader public interest in allowing the council to consider and carry out its statutory obligations and its functions without these being undermined.
54. With regards to the withheld information that is subject to LPP, the Commissioner has consistently recognised the principle that public authorities should be able to consult with their lawyers in confidence to discuss, and 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.
55. It is also clear that the matters to which the withheld information relate were still very much live at the time of the request. It is the Commissioner's view that disclosure at that time would represent an unwarranted interruption to the process, and that the council's consideration of its legal position would most likely have been undermined.

56. Furthermore, the Commissioner is mindful that there are existing planning and, ultimately, legal processes which allow any concerns about the processes which have, or have not, been followed, to be properly addressed. She has not been presented with any evidence that there are grounds for circumventing the legal mechanisms and remedies which are already available in relation to this particular case.
57. The Commissioner also regards it to be of some significance that the council had confirmed to the complainant that, once the investigation was complete, the legal officer's report setting out full details of the investigation and the conclusions, would be made available (and she understands that the report was subsequently released).
58. Whilst the Commissioner accepts that the arguments in favour of disclosure carry specific weight in this case, she does not consider that they outweigh the arguments in favour of withholding the information.
59. 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)*'⁴; '*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).
60. 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 to part 2 of the complainant's request.

⁴ [SGIA 44 2019ii.pdf \(publishing.service.gov.uk\)](#)

Procedural matters

Regulation 5(2) – time for compliance

61. Regulation 5(2) of the EIR states that information should be made available as soon as possible, and within 20 working days of receipt of the request.
62. The complainant submitted his request on 28 December 2019. The council only provided him with copies of information relevant to part 2 of his request on 14 April 2020, which is well in excess of the required 20 working days.
63. As a result, the council has failed to comply with the requirements of regulation 5(2) of the EIR.

Regulation 14 – Refusal to disclose information

64. Under regulation 14(2) of the EIR, if a request for environmental information is refused by a public authority under regulation 12, the refusal must be made as soon as possible, and no later than 20 working days after the date of receipt of the request.
65. In this case, as the council only issued its refusal notice on 14 April 2020, the Commissioner has found a breach of regulation 14(2) of the EIR.

Right of appeal

66. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

67. 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.
68. 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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