

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

**Date:** 26 July 2021

**Public Authority:** Environment Agency  
**Address:** Horizon House  
Bristol  
BS1 5AH

**Decision (including any steps ordered)**

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1. On behalf of their client, the complainant, a firm of solicitors, has requested information associated with an application to the Southern Regional Flood and Coastal Committee relating to grant-in-aid funding. The Environment Agency (EA) released some information and withheld the remainder under regulation 12(5)(b) of the EIR (course of justice). EA considered the public interest favoured maintaining this exception. EA has subsequently advised that, on reconsideration, it considers it could also rely on regulations 12(4)(e) (internal communications) and 12(5)(e) (commercial interests) to withhold the information in question.
2. The Commissioner's decision is as follows:
  - The information EA is withholding engages the exception under regulation 12(5)(b) of the EIR and the public interest favours maintaining this exception.
3. The Commissioner does not require EA to take any remedial steps.

## Background

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4. In its submission to the Commissioner, EA has provided the following background. It says that the complainant has acted for a particular family in a long running dispute with EA, about agreements to maintain private sea defences along a stretch of sea frontage. The family alleges that the EA is in breach of the maintenance obligations and that this has caused the family loss. The parties have exchanged significant legal correspondence, including pre-action correspondence on 26 January 2016, and legal proceedings have been threatened repeatedly. The parties have recently attended mediation.

## Request and response

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5. On 9 March 2020 the complainant wrote to EA and requested information in the following terms:

“We request information and any submissions pertaining to the formulation, together with a copy, of the Funding Calculator used to calculate the Partnership Funding Score of 31%. This can be either provided in its Excel spreadsheet format, or a print-out of the ‘PF Calculator’ page.”
6. EA responded on 14 May 2020. It relied on regulation 12(5)(b) of the EIR to withhold the requested information and advised that it considered that the public interest favoured maintaining the exception.
7. EA provided an internal review on 30 July 2020. It revised its position and released the requested partnership funding calculator. However, EA maintained its reliance on regulation 12(5)(b) with regard to the “information and any submissions pertaining to the formulation” element of the request. EA has subsequently advised the Commissioner that it considers that the exceptions under regulation 12(4)(e) and 12(5)(e) are also engaged.

## Scope of the case

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8. The complainant contacted the Commissioner on 30 September 2020 to complain about the way the request for information had been handled.
9. In the first instance, the Commissioner’s investigation has focussed on EA’s reliance on regulation 12(5)(b) of the EIR to withhold some of the requested information, and the balance of the public interest. If

necessary, the Commissioner has been prepared to consider EA's reliance on regulation 12(4)(e) and/or regulation 12(5)(e).

## Reasons for decision

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10. Under regulation 12(5)(b) of the EIR a public authority may refuse to disclose information to the extent that its disclosure 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.
11. In its submission to the Commissioner, EA has said that, as a public body, it needs to justify its expenditure and comply with funding policy set by Defra. The requested information concerns the project business case created to justify and secure funding to gain technical and legal advice on the agreements which are the source of the dispute between the EA and the family. The requested information contains information which relates to the EA's risk assessment of the threatened litigation, which is derived from legal advice. The information requested has been created for the dominant purpose of dealing with the disputed matter which is the subject of contemplated litigation.
12. To find out how much flood and coastal risk management grant-in-aid funding (FCERM GiA) a project could be eligible for the EA uses a spreadsheet known as the partnership funding (PF) calculator. The spreadsheet produces a partnership funding score which determines how much FCERM GiA the project could be eligible for. Project funding is reported to the Regional Flood and Coastal Committee (RFCC) and information reported by the Southern RFCC in January 2020 led to the family's request for information in March 2020. The relevant bid for funding/expenditure in this case was made on the basis that litigation was threatened and to enable the EA to consider the legal case it faced, in addition to how it might be able to resolve the dispute with the family.
13. EA has told the Commissioner that the withheld document is a 'Management Legal Agreements Implementation Project – Strategic Outline Case' document ('the Document'). It has identified this Document as falling within the scope of the request as it contains 'information and submissions pertaining to the formulation' of the requested PF calculator which has already been disclosed. EA has provided the Commissioner with a copy of the Document.
14. EA has confirmed that it is relying on regulation 12(5)(b) because disclosing the Document would adversely affect the course of justice. This is because the withheld information attracts both legal professional

privilege (LPP) *and* litigation privilege. It considers that even if the Commissioner believed the Document does not attract LPP disclosure would still adversely affect the course of justice as civil proceedings are contemplated.

15. With regard to the matter of LPP, EA says that the withheld information is contained in a confidential document as the project was designated as sensitive and this is evidenced by the SENSITIVE: PROTECT marking given to the Document at the bottom of page 2 of the Document. Further, the Document is clearly marked on the front page as being '*Subject to Legal Professional Privilege*' and includes the following caveat '*Please note that this document contains legal advice which should not be disseminated outside of the Environment Agency. Please therefore do not forward on within the Environment Agency and if this document is subject to a Freedom of Information request please contact Legal so that the legal advice can be redacted from the version disclosed in response to that request*'.
16. EA says the Document was created with the intention that it would be subject to legal professional privilege as it is based on legal advice received about the prospects of success/risk in relation to resolving the dispute. In its submission to the Commissioner, EA has said that the Document "has *not* been created" to outline EA's approach to work needed in relation to resolving the disputed matter, to justify and gain approval for expenditure to carry out the work. The Commissioner understands this to be a 'typo' and that EA intends to mean that the Document *has* been created for the above purpose. In its submission EA goes on to say that it believes that the Document is subject to LPP and should not be disclosed as there is an ongoing dispute about how a particular beach should be managed in the future. This Document has been created for purposes relating to this 'live' issue.
17. EA goes on to say that the Document is a confidential EA internal communication created by the client (EA Project Manager) following legal advice received from an inhouse lawyer relating to heading off or settling the dispute between the Parties. The Document has passed between the client and in-house lawyers and is primarily about a legal issue - the 'maintenance of the [redacted] Legal Frontage' - which is a disputed matter. The case of *SFO v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006* confirmed that advice given to head off, avoid or settle is covered by litigation privilege as much as advice given for the purpose of defending them.
18. Further, EA says, it is the legal advice received that has formed the foundations for the case made for [spending the] funding in the Document, and to which the information sought relates. EA believes in this case that legal advice privilege extends to information sought as it

evidences the substance of communications passing between client and lawyer for the purpose of giving and receiving legal advice (*Three Rivers DC v Bank of England (No 5)* [2003] EWCA Civ 474 (*Three Rivers (No 5)* at paragraphs 19 and 21).

19. EA considers that disclosing the requested information would undermine its strategy on resolving the dispute. In the case of *Edwardian Group Limited* [2017] EWHC 2805 (Ch), which concerned an application for the disclosure of a party's litigation funding agreement, the English High Court held that documents which give an opponent "a clue to the advice given" by the legal representative or "betrays the trend of the advice being given" are also now protected by legal advice privilege. Therefore privilege can apply to documents in which legal advice is not explicitly stated but can be inferred EA says it is aware that legal advice privilege will apply only where there is "definite and reasonable foundation in the contents of the document for the suggested inference". Here EA believes this is clearly the case because the requested information includes details of the range of settlement figures considered reasonable by the EA, and that a settlement in excess of a certain sum might be made if the holder of the agreements (the family) could justify their position. The requested information also speaks to the risks and rewards of a potential settlement and to the EA's negotiating strategy. This information is directly derived from legal advice and indeed is legal advice. For the above mentioned reasons EA says it believe that the information attracts legal advice privilege.
20. EA goes on to say that the Document was created for the dominant purpose of dealing with contemplated adversarial proceedings. It contains sensitive information based on legal advice. This is mainly the evaluation of options to potentially end legal agreements that have tied the EA into ongoing beach and structure maintenance that have been shown to offer little economic benefit.
21. The Document is the EA's business case to justify and permit spending on a project which is the subject of a dispute between the Parties and in respect of which litigation is contemplated if a settlement cannot be reached. The confidential and sensitive information is required to be documented in the form it has been, as those "improving" [the Commissioner considers EA may have meant "approving" here] internally need to have all the background to the matter when making funding decisions. This includes the legal position and legal advice. The funding will ultimately allow lawyers to settle the dispute or prepare a case for litigation which is reasonably contemplated. The information sought is privileged as it includes EA's options and opinions based on legal advice regarding heading off and/or settling threatened litigation relating to the project. The information documented is required to secure funding for the purposes of dealing with the dispute and

potentially terminating the legal agreements which are the subject of the dispute. EA therefore maintains that the genuine contemplation of litigation is the dominant purpose of the Document as it is a confidential communication created by the client for the dominant purpose of resolving the dispute and/or for lawyers to use in preparation for the contemplated litigation (as it includes information regarding the amounts that have been authorised to settle the dispute).

22. EA says it has set out the details surrounding the contemplated litigation under the heading 'Background'. The likelihood of the litigation taking place is very much a real possibility and is evidenced by a pre-action letter EA has sent to the Commissioner from 26 January 2016, and an email of 4 April 2021 in which threat of imminent litigation was repeated. EA says that, further, the fact that mediation has taken place shows the very real intent of the family to litigate this matter through the courts should a settlement not be reached.
23. On the matter of LPP, EA has finally confirmed that the privilege attached to the Document has not been waived as the Document is an internal communication that has not been shared with anyone outside of the Environment Agency. As stated in the Commissioner's guidance on legal professional privilege (section 42 of the Freedom of information Act): *"In a freedom of information context, LLP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential"*.
24. EA's submission has next considered disclosure adversely affecting the course of justice.
25. It believes that disclosing this Document into the public domain would adversely affect the course of justice as it would reveal information that could be used to derive its legal strategy in advance of legal proceedings being commenced or a settlement being reached. The Document is EA's 'Strategic Outline Case' (as referred to on its front page) and sets out its tactical strategy to try to deal with the ongoing dispute and contemplated legal proceedings. It would be unfair, EA says, if this information were disclosed into the public domain as it could be used by a potential litigant to undermine its strategy and thereby adversely affect the course of justice. Disclosing the information would allow the complainant to derive or deduce information regarding EA's strategy and thus be able to undermine it.
26. EA considers that disclosing this Document at this stage when the dispute is not settled would adversely affect the course of justice as it would involve public access to privileged information whilst the issue is still 'live'. Disclosing the information is likely to result in the level playing field under which adversarial proceedings are meant to be carried out

being unbalanced. This would prejudice the proceedings. EA also notes the likely adverse effect on the course of justice because the parties involved have the expectation that such information will only be disclosed under the established regime of those rules i.e. under the Civil Procedure Rules. EA considers this information would currently not be disclosable under those Rules and disclosing it under EIR instead would likely undermine general confidence in the judicial system.

27. EA argues that if the information explaining the composition of the funding score (including potential compensation sums and costs savings), was released it would be at a disadvantage with regards to any adversarial proceedings, as the complainant would obtain information about its risk analysis of the case whilst it is in the process of negotiating the settlement of the dispute. Providing such sensitive information could seriously jeopardise the course of justice (i.e. if the figures regarding compensation and cost saving were revealed the complainant could use this information in negotiating a higher amount). In a worst case scenario they could issue proceedings to try to strengthen their position. EA notes that in open correspondence in April of this year it was clearly told that legal proceedings would be issued if the dispute is not resolved, and EA says it considers this to be a very real threat.
28. Finally, EA notes that in the case of *Bellamy v Information Commissioner and the 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'. Disclosing legal advice would, EA says, 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.
29. In their submission to the Commissioner, the complainant has discussed why the information being withheld does not engage the regulation 12(5)(b) exception. They define legal professional privilege and litigation privilege and say that they consider that the information they have requested is background to the figures and the score EA put forward in its application for flood defence grant-in-aid.
30. If the supporting information was prepared for the purpose of obtaining legal advice, the complainant argues, this suggests that this was an academic process undertaken solely to support the litigation. If that was the case, the complainant queries why the application was submitted to the Southern Regional Flood and Coastal Committee and included on the EA's forward expenditure plan. That had been submitted as an application for funding and had been assigned a unique project number.

31. The complainant says that if an application for spending taxpayer's money has been made and this is the dominant purpose for which the information has been compiled, then the information supporting this application should be made available through the FOI process, and is not covered by legal privilege.
32. The complainant goes on to say that information used to support an application for grant aid would typically be prepared by a member of the EA's technical team or one of the EA's consultants, as there is a strong reliance on understanding the technical mechanisms associated with flood and coastal erosion risk management. The complainant considers that if, as the EA claims, the supporting information has been prepared by professional legal advisers, then this must cast doubt on the technical validity of the application itself. If this were purely an academic exercise, then this might be understandable. But, the complainant says, given that an application for funding has actually been submitted, then this suggest it was not an academic exercise undertaken purely for the purpose of providing or obtaining legal advice in relation to the current ongoing dispute. The complainant considers that the information seems most unlikely to have involved lawyers, is not legal advice to the EA, and was not created for the dominant purpose of the possible litigation (or indeed for that purpose at all). It is therefore not covered by the exception under regulation 12(5)(b).

*The Commissioner's conclusion*

33. The Commissioner has reviewed the information being withheld. This Document is a business case for approval for spend on a project associated with ongoing beach and structure maintenance in a particular location. The Commissioner understands that project concerns resolving an ongoing dispute.
34. The complainant says the Document was created for the dominant purpose of a funding application to Southern Regional Flood and Coastal Committee for flood defence grant-in-aid, and so the information cannot attract legal professional privilege.
35. EA has confirmed to the Commissioner that the withheld Document was used to support an application to Southern Regional Flood and Coastal Committee for flood defence grant-in-aid. However, EA has clarified that the purpose of the business case Document was not to *secure* funding but to *justify* spending it. The funding that was proposed to be spent was for technical and legal advice on the agreements which are the source of the dispute between the EA and the family.
36. EA says that other (unrelated) funding applications to the Southern Regional Flood and Coastal Committee did relate to flood defence works



at different locations, and therefore the family in question might suppose that this application was made on the same basis, rather than for funding for technical and legal advice on the disputed agreements.

37. In the Commissioner's view, the Document does attract LPP and litigation privilege for the reasons EA has given. First, the purpose of the expenditure proposed in the Document is enable the EA to consider the legal case it faced and how it might be able to resolve the dispute with the family; these matters are discussed in the Document. In addition, litigation has been threatened against EA in the past, and the Commissioner is satisfied that it remains a real possibility. Second, the Document is based on legal EA advice received about the prospects of success/risk in relation to resolving the dispute. Finally, with reference to *Edwardian Group Limited [2017] EWHC 2805 (Ch)*, the Commissioner considers that the legal advice informing the Document, while not specific in the Document, can be inferred from it.
38. The Commissioner also considers that disclosing the Document would adversely affect the course of justice. This is because the associated dispute was still live at the time of the request. Disclosing the Document would reveal EA's strategic response to resolving the dispute or managing potential legal proceedings resulting from the dispute. Disclosure would give an advantage to the other party and would therefore undermine EA's position.
39. The Commissioner is therefore satisfied that disclosing the Document in question is excepted from disclosure under regulation 12(5)(b) of the EIR. She has gone on to consider the public interest test.

### **Public interest test**

#### Public interest in disclosing the information

40. EA says that it recognises that under the EIR there is a presumption in favour of disclosure. It also took account of the general presumption of openness need to promote accountability and transparency. Finally, EA says it recognises that there is always an inherent public interest in transparency and in understanding how organisations are spending taxpayer's money.
41. The complainant concluded their submission to the Commissioner by noting that it was difficult to see how information which underlies a public application for the spending of taxpayer's money should be withheld. In the complainant's view the information should be disclosed in any event by applying the public interest test.

Public interest in withholding the information

42. EA has referred specifically to the decision in the case of *DCLG v Information Commissioner & WR [2012] UKUT 103 (ACC)*. This makes it clear, EA says, that wherever disclosure of legally privileged information is sought, the decision maker should consider the general harm to the public interest which is likely to occur every time that this principle is not upheld, even if it may be arguable that there is no or little harm in the instant case. Weakening public confidence in the general principle of LPP is a public interest factor of very considerable weight in favour of maintaining the exception. The case confirms that there needs to be special or unusual features in a particular case to justify not giving it this weight and EA argues that there are no such features in this case. Applying these principles EA acknowledges the presumption in favour of disclosure required by the regulations, but on this occasion believes that there is “no unusual factor strengthening”.
43. EA has also considered whether the requested information is in the public domain, which it is not, and the significance of releasing the information to the public in general. EA says it recognises that the complainant has a strong personal interest in acquiring the withheld information. However, EA cannot see the wider public benefit to the information. Its argument is to the contrary in that there is a substantial benefit to the wider public in the course of justice not being adversely affected by releasing information that is subject to LPP or which would undermine legal proceedings whilst the issue is live. The important principle of privilege would be undermined for the sake of providing information that is not of great significance to the wider public in general.
44. EA argues that the unchanging significance of the public interest in protecting the principle of LLP and the course of justice weighs heavily in this case and that it should not be placed at a future disadvantage by potential litigants gaining unfair insights into legitimately confidential strategies to settle a dispute in respect of which litigation is highly likely.
45. Further, EA says, it has sought to provide as much information as it can and has disclosed the Funding Calculator which was also requested. However, EA confirms that it is unable to disclose the ‘submissions or information pertaining to the formulation of the Partnership Funding Score of 31%’ as it believes this information to be LPP.
46. EA concludes by confirming that disclosing the information would have an adverse effect on the course of justice as it reveals the EA’s approach to dealing with the dispute because it would reveal its strategies and tactics whilst the dispute is live.

Balance of the public interest

47. The complainant's argument is that disclosure is in the public interest as the funding/expenditure in question concerns taxpayers' money. The complainant appears to consider the funding application is for flood defence work and, as such, does not consider that the Document could attract LPP or litigation privilege. This argument therefore relies on the information having been found not to engage the 12(5)(b) exception. The Commissioner has found the opposite.
48. The dispute about which the Document is associated was still live at the time of the request, and the Commissioner understands that it remains live. The complainant had threatened litigation against EA in 2016. They had also referred to potential litigation again in April 2021 although the Commissioner notes that that was after the date of the request.
49. While the Commissioner appreciates the Document is of interest to the complainant, she does not consider it of sufficient wider public interest such that it outweighs the very significant public interest in the principle of legal professional privilege; that is protecting communications between a professional legal adviser and their client from disclosure without the permission of the client, particularly while a dispute is ongoing. The Commissioner is satisfied that the balance of the public interest favours maintaining the exception on this occasion.
50. Since the Commissioner has found that regulation 12(5)(b) is engaged and that the public interest favours maintaining this exception, it has not been necessary to consider whether the exceptions under regulation 12(4)(e) and 12(5)(e) are engaged.

## Right of appeal

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

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

52. 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.
53. 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

**Cressida Woodall**  
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