

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 May 2022

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
SHRESBURY
SY2 6ND

Decision (including any steps ordered)

1. The complainant has requested an engineers report obtained by Shropshire Council in relation to a potential claim being considered by her.
2. Shropshire Council has withheld the engineers report under Regulation 12(5)(b) of the EIR on the basis that its disclosure would adversely affect the course of justice.
3. The Commissioner's decision is that Shropshire Council has successfully applied Regulation 12(5)(b) of the EIR.
4. The Commissioner does not requires the public authority to any steps to ensure compliance with the legislation.

Request and response

5. On 13 July 2021 the complainant wrote to Shropshire Council (the Council) and requested information in the following terms:

“Under the Freedom of Information Act, I am requesting a copy of the engineers report in relation to the claim `Sedgwick reference 8684734/INCL-LIAPMA Customer name Shropshire County Council”.
6. The Council responded on 17 August 2021. It apologised for the delay and stated it was withholding the report under Section 42 of the Freedom of Information Act 2000 (FOIA) on the basis that it related to `confidential information or communications made for the purpose of providing or obtaining legal advice about proposed or contemplated

litigation'. In added, the report was prepared for its insurer's Claims Handlers to allow them to consider whether the Council could be considered legally liable for the claim intimated by the complainant.

7. Having referred the matter to the Information Commissioner's Office for assistance, the complainant was advised to submit an internal review request which she did on 8 November 2021.
8. Following an internal review, the Council wrote to the complainant on 26 November 2021. It stated it was upholding its original decision under Section 42 of the FOIA. It reiterated the report was prepared for the purpose of investigating and advising on any potential legal liability the Council may have in relation to the complainant's potential legal claim.

Scope of the case

9. The complainant contacted the Commissioner again in November 2021 to complain about the way her request for information had been handled. In particular, she was unhappy with the Council's decision to withhold the requested report in its entirety under Section 42 of the FOIA.
10. On 21 March 2022 the Commissioner emailed the Council and invited it to reconsider the complainant's request under the EIR and issue a fresh response. He also requested a copy of the withheld information.
11. The Council responded on 29 March 2022. It maintained its position that the requested information was exempt from disclosure but revised the application of the legislation it originally relied upon. Instead of relying on Section 42 of the FOIA, the Council agreed with the Commissioner that the information was 'environmental' and said it was exempt under Regulation 12(5)(b) of the EIR. It argued disclosure of the information would adversely affect the 'course of justice' and that the public interest was balanced in favour of withholding it.
12. The scope of the Commissioner's investigation will be to determine whether the Council was justified in withholding the engineers' report under the EIR.

Reasons for decision

Background

13. The complainant believes that the Council is legally responsible for the damage to a wall bordering her property and has obtained evidence to support her view.

14. The Council has also obtained its own evidence and the report they have commissioned is the information the complainant has requested.

Is the requested information environmental as defined by the EIR?

15. 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);”

16. The Commissioner considers that, as the information requested in this case relates to the liability to maintain and repair a boundary wall, it is a measure affecting or likely to affect the elements and factors of the environment, such as land and landscape, as defined by Regulation 2(1)(a). He is therefore satisfied that the information falls within the definition of environmental information under Regulation 2(1)(c) of the EIR.

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

17. Regulation 12(5)(b) provides 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.
18. The Commissioner considers that the course of justice element of the exception is wide in coverage and accepts that it can include information about civil investigations and proceedings.
19. The Council has argued the information withheld under Regulation 12(5)(b) falls within the type of information covered by Litigation Privilege. Whilst the Council has argued this, the Commissioner notes that it is not necessary for information to fall within the limits of legal professional privilege (LPP) in order for the exception to be engaged; the exception will apply if the course of justice would be adversely affected even where the information is not subject to LPP.
20. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met:
 - the withheld information relates to one or more of the factors described in the exception,
 - disclosure would have an adverse effect on one or more of the factors cited, and
 - the public interest in maintaining the exception outweighs the public interest in disclosure.
21. The Council's position is that the disclosure of the information would have an adverse effect upon the course of justice. It argued that disclosure would be unfair because it would provide details of the Council's own legal position prior to the complainant making her claim to the court for damages.
22. It said the report was prepared in contemplation of a legal claim for the purpose of investigating liability and advising the Council as to any responsibility it may have. This was the sole purpose for which the report was created. As such it is a legally privileged document.
23. The Council stated legal professional privilege extends to litigation privilege and applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation.

24. For information to be covered by litigation privilege, it must have been created for the dominant or main purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. As the report was created solely for this purpose, the Council argued that it was covered by litigation privilege.
25. It could be argued the Civil Procedure Rules (CPR) would be undermined if a complainant was able to obtain information relating to a defence to the complainant's potential claim prior to her making it to the courts. From the Council's point of view any disclosure of this information prior to the CPR requiring it, would prejudice its ability to defend its case, and undermine the fair playing field which court proceedings rely upon to reach a fair and balanced decision. Thus, the Council considers that the course of justice would be prejudiced if the information were to be disclosed.
26. The Commissioner notes comments made by the Information Tribunal in *Rudd v the Information Commissioner & the Verderers of the New Forest (EA/2008/0020, 29 September 2008)* that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'".
27. There is a set process for necessary information to be obtained if there is a need to make a claim to the courts for damage to property. The Commissioner accepts that this process should be followed rather than requesting that information via the EIR where the courts have no oversight and management of the disclosure of the information.
28. The Commissioner notes that previous Decision Notices have been issued in relation to requests for information relating to damage to cars caused to vehicles by driving over pot holes. Again, the question in those cases was whether the Council should disclose information in regard to a legal claim which was in the process of being resolved, outside of the requirements of the CPR. The Notices in question upheld the use of the exception to withhold the information.¹ Although the present case does not involve damage caused to a vehicle, the principals

¹ FER-0611819 https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624521/fer_0611819.pdf

and IC-45186-B4K7 <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619209/ic-45186-b4k7.pdf>

are the same regarding disclosure of evidence in advance of a potential legal claim.

29. The Commissioner also notes also that a disclosure of the information would divulge the Council's arguments, including any weaknesses in its arguments, which might therefore allow the claimant to frame the grounds of her claim in away to tip the balance in favour of the complainant in adversarial proceedings unfairly.
30. The Council has considered the complainant's arguments, but disputes liability for the damage. It is therefore for the complainant to take the case to court should she believe that her evidence provides the proof that the Council is liable. The complainant however is seeking to know why the council considers that it is not liable prior to taking those proceedings forward, which may help her in framing her arguments to the court.
31. Having considered these factors, the Commissioner accepts that it is more probable than not that a disclosure of the information would undermine the existing legal remedies in this matter and therefore adversely affect the course of justice.
32. He is therefore satisfied that Regulation 12(5)(b) is engaged.

The public interest test

33. Having concluded that the exception is engaged, the Commissioner must carry out a public interest test into the application of the exception as required by regulation 12(1)(b). The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
34. When considering the balance of the public interest, a public authority must take account of the express presumption in favour of disclosure identified in regulation 12(2) of the EIR.

The public interest in the disclosure of the information

35. There is a general public interest in the Council being transparent and accountable for its actions.
36. Where there are allegations that the actions or omissions of the Council have resulted in damage to the property of a private individual there is a public interest in scrutinising those actions or omissions and, if the Council is at fault, in rectifying that damage at the cost of the Council.
37. If the Council holds information which demonstrates that it was responsible for the damage which was caused there is a significant public interest in it being fair and admitting its liability and

recompensing the individual for the damage caused without the need for litigation.

The public interest in the exception being maintained

38. The Council, citing the Tribunal decision in *Calland v Information Commissioner & Financial Services Authority EA/2005/0023*², argues there is a strong public interest inherent in Regulation 12(5)(b) of the EIR to protect legal professional privilege and confidential communications between lawyer and client.
39. The Council does not consider that it caused the issue in this case and has provided its alternative position with regards to the cause of the damage to the complainant's property.
40. The Commissioner recognises that there are procedures in place for the individuals to follow in order to seek compensation for damages caused by third parties, and this ultimately lies with the courts.
41. The Council has a legal obligation to protect the public purse from liability claims where it is not at fault. In this case, the Council argues that it is not liable for the damage to the complainant's wall and has provided an alternative explanation as to its cause.
42. There is a public interest in allowing it to defend itself against a legal claim of this nature on a fair and equal basis, following the process and procedures set down in law for dealing with such claims. There is a strong public interest in protecting the integrity of this process.
43. The Commissioner takes the view that a disclosure of the withheld information would undermine the course of justice as it would undermine the level playing field which is in place in the litigation process.
44. A disclosure of information which identifies the strengths and weaknesses in a public authority's arguments may allow a claimant to tailor their arguments to better their chance of winning.
45. A disclosure of an authority's detailed defence information prior to legal action being initiated may incentivise a claimant into making a claim to court. This would require the council to use public funds to defend a claim which may not otherwise have occurred.

² <https://www.casemine.com/judgement/uk/5b46f1ef2c94e0775e7ee628>

The balance of the public interest

46. It is clear in this case that the requested information is being sought to further a potential claim against the Council. This indicates to the Commissioner that there is a more appropriate regime than the EIR for accessing such information.
47. The complainant is seeking information which may identify whether the Council has any liability for the damage to her property. The Commissioner takes the view that the interests in play within this case relate primarily to the private interests of the complainant. However, he recognises that there are wider public interest arguments towards a disclosure of information of this type where the actions of a public authority may have led to damage being caused to private property. That being said, it is not for the Commissioner to make a judgement on liability, that is for the courts.
48. The Commissioner recognises the importance of the level playing field when litigation is in process or in contemplation. He considers that there is a strong public interest in maintaining the integrity of that process, as managed by the relevant court.
49. The Commissioner therefore considers that the public interest in maintaining the exception is strong in this instance. He has not identified any opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council, and it is not his role to make a judgement on the complainant's claims of liability. That is the role of the courts.
50. The Commissioner acknowledges that the complainant has a legitimate personal interest in accessing this information, however, the public interest in this context relates to the broader public interest in relation to the course of justice. He considers that the public interest in protecting the course of justice outweighs the private interests of the complainant in this case.
51. The Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the withheld information.

Right of appeal

52. 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

53. 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.

54. 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

**Laura Tomkinson
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