

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

**Date:** 20 October 2022

**Public Authority:** Liverpool University Hospitals NHS Foundation Trust

**Address:** Prescot Street  
Liverpool  
Merseyside  
L7 8XP

**Decision (including any steps ordered)**

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1. The complainant has requested structural surveys of a building. Liverpool University Hospitals NHS Foundation Trust ("The Trust") relied on section 42 of FOIA (Legal Professional Privilege) to withhold the requested information.
2. The Commissioner's decision is that the Trust should have dealt with the request under the EIR, however he also finds that regulation 12(5)(b) is engaged in respect of the withheld information and that the balance of the public interest favours maintaining the exception. As the Trust failed to rely on an EIR exception within 20 working days, it breached Regulation 14 of the EIR.
3. The Commissioner does not require further steps.

**Request and response**

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4. On 9 November 2021 the complainant requested information of the following description:

"[1] Relating to the new build and the structural failings - what precautions/measuring equipment is being put in place to assess long term issues/risks?"

"[2] In the Board Papers of the meeting of 26/10/2021 the following was included:

'c) New Hospital Committee – 5 August and 2 September 2021  
Whilst concern was raised surrounding a potential delay of materials related to cladding work, it was noted that any delay would not affect the readiness to move to the New Hospital. Board members discussed additional concerns relating to risks about several services scheduled to move to the New Hospital. A workshop has been scheduled to take place in October for assurance to be presented about operational readiness for the move alongside anticipated workforce issues.'

"what was the outcome of this 'workshop'?"

5. On 8 December 2021, the Trust responded. It refused to provide the requested information. In respect of element [1], it relied on section 42 of FOIA (Legal Professional Privilege) to withhold the information. In respect of element [2], it relied on section 22 of FOIA (intended for future publication).
6. The complainant requested an internal review on 8 December 2021 in respect of element [1]. The Trust sent the outcome of its internal review on 23 December 2021. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 24 December 2021 to complain about the way his request for information had been handled.
8. At the outset of the investigation, the Commissioner noted to the Trust that it was his provisional view that the request should have been dealt with under the EIR. He therefore invited the Trust to confirm whether it wished to rely on Regulation 12(5)(b) of the EIR (which covers material protected by privilege) and, if it did, to provide arguments for this exception.
9. The Trust subsequently confirmed that it did indeed wish to rely on this exception.
10. The complainant did not raise, either when seeking an internal review or in complaining to the Commissioner, an issue with the way the Trust dealt with element [2] of the request. At the outset of the investigation, the Commissioner wrote to the complainant indicating that, in light of this omission, he only intended to consider the Trust's reliance on

Regulation 12(5)(b) of the EIR. The complainant did not indicate any objection to such an approach and the Commissioner has therefore restricted his investigation to element [1] only.

11. The Commissioner considers that the scope of his investigation is to determine whether the Trust was entitled to rely on Regulation 12(5)(b) of the EIR to withhold information.

## **Reasons for decision**

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### **Is the requested information environmental?**

12. 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);

13. The information in question comprises of a report, supplementary annexe and slides from a powerpoint presentation. These documents, dated April 2018, chart the findings of a recent structural survey of the new Royal Liverpool University Hospital which, at that time, was under construction.
14. As this is information relating to a large construction project, the Commissioner believes that the requested information is information on a measure affecting the elements of the environment (eg. soil, landscape). For procedural reasons, he has therefore assessed this case under the EIR. During the course of the investigation, the Trust agreed that this part of the request should have been dealt with under the EIR.

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

15. Regulation 12(5) 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”

16. The Commissioner’s guidance on this particular exception states that the phrase “course of justice” should be interpreted fairly broadly. It can cover a broad range of situations including both the fairness of legal proceedings and legal professional privilege.
17. Legal Professional Privilege forms part of the foundation of our justice system, because of the importance of a person being able to communicate with their legal advisor in confidence.
18. Because privilege is such an important concept, the Commissioner accepts that breaching that privilege would have an adverse effect on the course of justice.
19. There are two types of legal privilege: legal advice privilege and litigation privilege. Litigation privilege will, as the name implies, cover correspondence between a professional legal advisor and their client when there is a realistic prospect of some form of litigation. Legal advice privilege will apply where litigation is either not contemplated or a distant prospect.
20. In his initial investigation letter, the Commissioner asked the Trust to explain which form of privilege it considered the withheld information to attract. He also asked the Trust to explain why documents that were

unlikely to have been drawn up by a lawyer would nevertheless be covered by legal privilege.

21. The Trust explained to the Commissioner that it considered that the material attracted litigation privilege. It noted that, in December 2021 it had commenced legal action in relation to the construction project and that the withheld information was "key evidence in proceedings".
22. It explained to the Commissioner that the documents had formed part of its Letter of Claim and that they were:

"key to the development of our legal claim, the work of the expert witness and the establishment of the claim quantum."
23. The Trust explained that, in its view, privilege had not been waived and the subject still formed part of "live" proceedings.

### **The Commissioner's view**

24. In the Commissioner's view, Regulation 12(5)(b) of the EIR is engaged in relation to the information being withheld.
25. The information is not itself a direct communication between a legal adviser and their client – however this does not necessarily prevent the information from being subject to legal professional privilege. Privilege can still attach to such documents if they were created for the purpose of being used to seek or to provide legal advice or for use in litigation.
26. In decision notice IC-123838-W7L2, the Commissioner was asked to consider a series of memos from the Trust's lawyers.<sup>1</sup> In his decision he noted that the memos "map a transition from litigation being a mere possibility to something that was imminent." The earliest memo was dated prior to the date of the withheld information in the present case. The Commissioner is therefore satisfied that, at the point the withheld information was created, the Trust was at least contemplating litigation.
27. The Commissioner is less convinced that the information was created for the dominant purpose of litigation – even if that is how it is now being used.
28. The primary focus of the withheld information is on identifying any structural issues with construction project and putting forward potential

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020790/ic-123838-w7l2.pdf>

solutions to remedy any defects. The Commissioner finds it difficult to believe that the commissioning of the report was not done, at least in part, to provide assurances that the new building was (or, at least, would be) safe.

29. However, it is not entirely necessary for the Commissioner to reach a definitive view on this point. The focus of Regulation 12(5)(b) of the EIR (as opposed to section 42 of FOIA) is not on whether the information is privileged, but on whether its disclosure would adversely affect the course of justice.
30. As the Trust has stated (and the Commissioner sees no reason to dispute), the withheld information forms a key part of the reason for its claim and is also likely to form part of its quantum (ie. the size of the claim being made, agreed or determined by a court).
31. The Commissioner recognises that the extent to which the construction project involves structural defects, and the costs of works necessary to remedy such defects, are likely to form the basis on which the legal action the Trust appears to be contemplating will ultimately be resolved. Therefore any information the Trust has which attempts to quantify these elements is likely to form part of its legal strategy.
32. The Trust has a right to keep elements of its legal strategy secret if that is required for securing the most favourable outcome. Indeed the Trust has a duty to secure value for money. At the point at which the request was responded to, the formal process of litigation appears to have only recently begun, therefore disclosing a fuller picture of the Trust's legal position, before it was ready or required to do so, could have hampered the Trust's ability either to win a claim in court or to achieve a settlement favourable to the public purse.
33. If disclosure impedes the Trust in pursuing a legal claim, it would inject unfairness into proceedings and would therefore adversely affect the course of justice. The Commissioner is therefore satisfied that Regulation 12(5)(b) of the EIR is engaged.

### **Public interest test**

34. As with most EIR exceptions, Regulation 12(5)(b) is subject to a public interest test. That means that, even if the information is capable of adversely affecting the course of justice, it must still be disclosed unless the balance of the public interest favours disclosure.
35. The Commissioner agrees with the complainant that the project to which the information relates is a significant one and will cost a large amount of public money.

36. In this case there is also a second element, which is that of safety. If a building is unsafe, it poses a risk to the construction workers operating within it and, if the defects go unremedied, to the patients and staff who will eventually occupy it.
37. However, as the Commissioner noted in IC-123838-W7L2, there is a stronger public interest in allowing the Trust to recover public monies in situations where contractors have not fulfilled their contracts. Disclosing information that would make it more difficult for the Trust to use the legal process to achieve a successful outcome is not in the public interest.
38. Whilst the Commissioner recognises that the information would have some bearing on health and safety, he also notes that, at the point the Trust responded to the request, the information was almost four years out of date. The report is thus likely to present a misleading picture that does not take into account more recent work that may have taken place to remedy any defects. The complainant has not indicated that he considers there to be ongoing issues of structural safety.
39. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exception.

### **Procedural matters**

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40. Regulation 14 of the EIR requires a public authority, wishing to withhold environmental information, to issue a refusal notice, within 20 working days, citing the EIR exception(s) on which it is relying to withhold the information in question.
41. Whilst the Trust did respond to the request within 20 working days, it failed to deal with the request under the EIR and therefore failed to cite an EIR exception. The Trust thus breached Regulation 14 of the EIR.

## Right of appeal

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42. 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)

43. 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.
44. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**