

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **31 August 2023**

Public Authority: **Dorset Council**
Address: **County Hall**
Colliton Park
Dorchester
Dorset
DT1 1XJ

Decision (including any steps ordered)

1. The complainant requested information relating to the extent of the highway near his property. Dorset Council ("the council") applied Regulation 12(5)(b) (course of justice) of the EIR to withhold some of the requested information. It also applied Regulation 13 to redact personal data from the information it disclosed.
2. The Commissioner's decision is that the council was correct to withhold the information under Regulations 12(5)(b) and Regulation 13.
3. The Commissioner does not require the council to take any steps.

Request and response

4. The history of this complaint is fairly convoluted. In summary, the complainant made a request for information on 25 April 2022. The council disclosed some information redacted under Regulation 13 (personal data), but it also withheld information under Regulation 12(5)(b) (course of justice), which it subsequently disclosed.
5. As a result of the council's response to that request, on 6 January 2023, the complainant re-made a request for information which he had previously requested on 7 December 2020. That request was for:

"We would like to make a freedom of information request as to the extent of the highway in this location. Please find attached a council determination of the highway in 2008, a record of the highway, dated 2014, and a further record of the highway, dated 2020.

Please could you explain what has occurred, and why, between 2008 and 2020, (including any external representations or complaints you may have received about the highway) which has resulted in an increase in the width of the highway in 2014 compared to the 2008 determination, and then an additional extension in the length of the highway at the Southern end in 2020 compared to both 2008 and the 2014 plan and provide all documentary evidence you hold as to why these two changes have occurred".

6. In response to the request in 2020, the council had disclosed some information but withheld other information on the basis that Regulation 12(5)(b) and Regulation 13 applied. In response to the request of 6 January 2023 the council responded on 28 March 2023. It said that given the drawn-out nature of the previous requests, it had now carried out a comprehensive review of its legal files to determine what information it holds which is relevant to the issue of the highway. It disclosed further information, but it continued to withhold other information under Regulation 12(5)(b) and Regulation 13.

Scope of the case

7. The complainant made his complaint to the Commissioner on 18 April 2023. He argues that the council was not correct to withhold the information falling within the scope of his request of 6 January 2023 under Regulation 12(5)(b). He also argues that it was wrong to apply Regulation 13 to redact information from specific correspondence which was disclosed to him in response to the requests highlighted above.

8. The following analysis therefore covers whether the council was correct to apply Regulation 12(5)(b) to the information falling within the scope of the complainant's requests of 6 January 2023.
9. It will also consider whether the council was correct to redact personal data from the specific correspondence highlighted by the complainant under Regulation 13.

Reasons for decision

Regulation 12(5)(b) – Course of Justice

10. This reasoning covers whether the council is entitled to rely on Regulation 12(5)(b) to refuse to disclose some of the requested information.
11. Regulation 12(5)(b) allows a public authority to 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.
12. The exception is wider than simply applying to information which is subject to legal professional privilege ('LPP'). Even if the information is not subject to LPP it may still fall within the scope of the exception if its disclosure would have an adverse affect upon the course of justice or the other issues highlighted.
13. The council provided the Commissioner with a copy of the withheld information. It said that the relevant documents were withheld or redacted on the basis that they contain information which is subject to legal advice privilege, which is one of the forms of LPP.
14. The withheld information is advice sought and received regarding issues about the extent of the highway in the context of a complaint made to the council by a third party. Insofar as the Commissioner is aware, the third parties are not directly related to the complainant's current complaint. The withheld information relates to whether the verges at the side of the road are actually part of the highway in the area. The advice is old advice as it was sought in 2008.

15. The council said that the withheld information compromises the following types of information:
 - internal communications between officers of the former Dorset County Council's highways department (the client) and the council's in-house legal advisers;
 - internal communications between officers of the council's legal services department – such as where one solicitor has prepared a memorandum for other solicitors working on the case or has made comments on draft responses to enquiries from external parties; and
 - notes made by in-house legal advisers recording information provided by the client department for the purposes of obtaining legal advice.
16. The Commissioner is satisfied from viewing the withheld information that it constitutes confidential communications between a client and a professional legal adviser made for the dominant purpose of seeking and/or providing legal advice. The issue upon which the advice was sought relates to a complaint and a potential enforcement case from a number of years ago. The Commissioner is satisfied that this information is subject to LPP.
17. The withheld information also includes associated correspondence from third parties which was passed to the legal advisors with the intention of informing them of the background when formulating their advice.
18. The council clarified why it considers that a disclosure of the information would have an adverse affect upon the course of justice. It argued that a party, including the requestor, may decide to legally challenge the council's determination regarding the extent of the highway. If that occurs, the withheld information would reveal the strengths and weaknesses of the council's position, and this risks unbalancing the level playing field under which legal proceedings are meant to be carried out. The Commissioner is satisfied that a disclosure of the information would risk undermining the level playing field in such proceedings should a challenge to its decisions be made.
19. The Commissioner has next considered the likelihood that disclosing the information would have the adverse affect envisaged. The withheld information was written a number of years ago, however the issue relates to land law, which often relies upon references in historical and archived material from many decades prior to a complaint. He is satisfied that the advice remains live advice, as the wider issues involved remain present. This is evidenced by the requests it has received from the complainant. The Commissioner is also satisfied that there is a potential for legal challenges to be made in the future due to

the nature of the wider property issues which hinge on the question of the extent of the highway in the area.

20. The complainant argues that LPP has been waived and that the advice is now in the public domain. The council disputes that privilege had been waived on the withheld information. The Commissioner has considered the complainant's evidence in this respect. It relates to a short response issued by a councillor to a member of the public. The Commissioner does not consider that this short paragraph constitutes a waiver of the legal advice. It is not a significant disclosure and does not contain the detailed legal analysis of the situation held in the withheld information.
21. The Commissioner is therefore satisfied that disclosure of the requested information would have an adverse effect on the course of justice. He has therefore decided that the exception at Regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

The public interest

22. With regards to the public interest test, in its internal review response the council outlined the factors it took into account in favour of disclosing the requested information. It noted that there is a public interest in transparency and accountability regarding local government decision making and accepted that this would be furthered by the disclosure of the requested information.
23. The Commissioner agrees that there is a public interest in creating transparency on issues relating to the extent of the highway, and more widely, how the council goes about determining the situation in cases where that comes into question.
24. The council argued that there is generally a strong public interest in maintaining LPP, and that this is stronger where a matter remains a live issue. It argued that disclosing the information would prejudice its position on the issues involved. It noted that:
 - The land at the centre of this dispute appears to be of interest to a low number of individuals and has not attracted broader public attention since the dispute arose in 2008.
 - There is a strong public interest in local government officers being able to request and receive free and frank legal advice on complex matters.

25. The Commissioner notes a strong public interest in allowing clients to speak freely and frankly with their legal advisers on a confidential basis. This is a fundamental requirement of the English legal system. The ability to do so provides informed decision making and ensures that local authorities make legally robust decisions.
26. The Commissioner has seen no evidence that there has been a lack of transparency by the council over the issue. Nor has he seen any evidence that there has been any misrepresentation of the legal advice which it received.
27. The Commissioner has taken into account the circumstances surrounding the request, both the council's and the complainant's arguments, the timing of the request and the nature of the withheld information. He is satisfied that the public interest in maintaining the confidentiality of the discussions and legal advice, over a matter which remained live at the time of the request, lies with the exception being maintained in this instance.
28. 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. Whilst the Commissioner has taken into account the requirements of Regulation 12(2), he considers that the public interest that lies in favour of maintaining the exception clearly outweighs that in the information being disclosed in this instance. As the withheld information concerns a live issue, the Commissioner does not consider that the presumption in Regulation 12(2) tips the balance in favour of disclosure in this instance.
29. Therefore, 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.

Regulation 13 – personal data of third parties

30. This reasoning covers whether the council is entitled to rely on Regulation 13 to redact information from emails identified by the complainant, which were disclosed to him in response to his requests for information. The arguments are also applicable to personal data which has been withheld under Regulation 12(5)(b) from the information considered above.
31. Regulation 13 provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

32. Section 3(2) of the Data Protection Act 2018 defines personal data as:

“any information relating to an identified or identifiable living individual.”

33. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

34. The Commissioner is satisfied that the redacted information is personal data. It is details from members of the public's correspondence with the council regarding the extent of the highway and associated issues regarding this. The redacted information contains personal views and information which would allow the writers to be identified, both directly, and indirectly from the written material. There are also some redactions of other third parties' contact details or information which would allow them to be identified.

35. As the Commissioner accepts that the information is third party personal data, the next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focused on the application of principle (a), which requires that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

36. In the case of an FOIA request, personal data is processed when it is disclosed in response to a request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

37. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

38. The Commissioner has determined that the complainant, and the wider public, have a legitimate interest in understanding how the council addresses issues as regards the extent of the highway. The complainant also has a legitimate interest in understanding the history of the extent of highway and the context in which this was decided.

39. The Commissioner must therefore balance these legitimate interests against the rights and freedoms of the individuals whose personal data has been withheld.

40. Whilst the Commissioner has identified that there are legitimate interests in disclosure, and that disclosure would be necessary to satisfy those legitimate interests, the Commissioner has decided that these legitimate interests do not outweigh these individual's fundamental rights and freedoms in this instance.
41. The Commissioner has determined this by balancing the legitimate interest which have been identified against the fact that the individuals concerned would have a reasonable expectation that their information would not be disclosed to the public.
- a) The majority of the information has been disclosed. The redacted sections relate to information which would allow the writers to be identified, or where they regard other identifiable individuals.
 - b) The individuals are members of the public who were seeking to clarify matters with the council due to their own personal concerns.
 - c) They would not have expected that their details would be disclosed to the whole world in response to an information access request, particularly a significant period of time after their correspondence had been sent.
 - d) The issues in the redacted sections are personal to the individuals, concern a challenging situation, and a disclosure would therefore be likely to be distressing to the individuals concerned.
 - e) The Commissioner has identified that the public has a legitimate interest in understanding how the council decides what the extent of a highway is. The redacted information does not primarily relate to this, however, but to private issues arising as a result of the extent of the highway being unclear. As such, a disclosure of the redacted information would not meet the legitimate interests identified.
 - f) A disclosure of the information redacted under Regulation 13 would not shed greater light on why the extent of the highway has been decided as it has. That information has been withheld under Regulation 12(5)(b).
42. Having considered the above, the Commissioner has determined that there is insufficient legitimate interests to outweigh the fundamental rights and freedoms of the individuals. Therefore, he considers that there is no legal basis for the council to disclose the requested information, and to do so would be in breach of principle (a).

43. As the Commissioner has concluded that disclosure would not be lawful under Article 6(1)(f) of the UK GDPR, he has not gone on to separately consider whether disclosure would be fair or transparent.
44. The Commissioner's decision is therefore that the council was correct to redact the information under Regulation 13 of the EIR.

Right of appeal

45. 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

46. 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.

47. 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

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF