

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 4 January 2024

**Public Authority:** Bristol City Council  
**Address:** The Council House  
College Green  
Bristol  
BS1 5TR

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to a planning application concerning Bristol Zoo. Bristol City Council ("the council") withheld some of the requested information under Regulation 12(5)(b) (course of justice) and said that other information was not held by it.
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(b) to withhold relevant information. However, he has decided that the council has not complied with the requirements of Regulation 5(1) of the EIR as it has failed to demonstrate, on the balance of probabilities, that no further information is held by it falling within the scope of the request for information.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - To carry out further adequate and appropriate searches for relevant information and to respond to the complainant's request for information again.

4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. Following earlier correspondence, on 31 May 2023, the complainant wrote to the council and requested the information in Annex 1 to this decision notice.
6. The council responded on 26 June 2023. It said that some information was not held by it, and it withheld other information on the basis that section 42(1) of FOIA applied (legal professional privilege) (LPP).
7. Following an internal review, the council provided its response on 24 August 2023. It noted that the information should have been considered under the EIR rather than under FOIA and amended its position as follows.
  - After carrying out further searches, it located further information which it disclosed to the complainant. It said that no further information is held by it falling within the scope of the request for information that is not exempt from disclosure under the exceptions cited.
  - It also amended its position regarding the application of section 42 of FOIA. It applied Regulation 12(5)(b) of the EIR, (course of justice) to continue to withhold the information it argues is subject to LPP.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 8 September 2023 to complain about the way their request for information had been handled.
9. He argues that further information should be held by the council, and that the council was not correct to apply Regulation 12(5)(b) to withhold the information from disclosure.
10. The complainant expressed concerns about the actions of a council planning officer. Whilst the Commissioner notes this, the Commissioner has no powers to consider whether the council or its officers acted appropriately in terms of the planning process. As such, the

Commissioner is not able to take the complainant's concerns in this respect into consideration in this decision notice.

11. The following analysis therefore considers whether the council was correct to apply Regulation 12(5)(b) to withhold the information subject to LPP, and whether any further information is held by the council falling within the scope of the complainant's request for information.

## **Reasons for decision**

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

12. This reasoning covers whether the council is entitled to rely on Regulation 12(5)(b) to refuse to disclose some of the requested information.
13. 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.
14. 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.
15. 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 subject to legal advice privilege, which is one of the forms of LPP.
16. The council clarified that the information is legal advice provided by the council's in-house legal adviser to its officers, and advice received from independent professional legal counsel. Having viewed the information, the Commissioner is satisfied 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. As such, the Commissioner is satisfied that the information is subject to legal advice privilege.
17. The council has explained that the withheld information relates to an ongoing live matter; a planning application which is still subject to appeals.

18. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
19. The complainant argues that LPP has been waived as the advice was provided to the Zoo to consider. The council argues that the advice was disclosed to the Zoo on a confidential basis. The Commissioner's guidance on the application of section 42 of FOIA specifically addresses the issue of privilege being waived. It states that under FOIA, LPP 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 confidential. A restricted disclosure of the information, such as that described by the complainant and accepted by the council, would not compromise the privileged status of the information. The Commissioner therefore accepts the council's arguments in this respect.
20. Having considered the above, the Commissioner is 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 required by Regulation 12(1) of the EIR. The test is whether, in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
21. When carrying out the test, the Commissioner must bear in mind that Regulation 12(2) of the EIR provides a presumption towards the disclosure of the information.

The public interest

22. There is a public interest in transparency and accountability as regards local government decision making. The issues regarding the Zoo are contentious, and a number of news articles have been published relating to criticisms of the process undertaken by the council in passing the planning application.
23. On the counter side, 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.
24. 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.

25. The Commissioner is not aware of any evidence of there being a lack of transparency by the council over the advice, nor has he seen any evidence that there has been any misrepresentation of the legal advice which it received.
26. 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.
27. 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 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.
28. 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 5(1) – Duty to make available information upon request**

29. Broadly, Regulation 5(1) provides that, subject to an exception applying, a public authority that holds environmental information shall make it available on request. This duty is subject to the application of any exceptions or other qualifications to the duty to disclose outlined within the EIR. Regulation 12(4)(a) applies where the requested information is not held by the authority at the time that the request was received.
30. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
31. In other words, in order to determine such complaints, the ICO must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request and which was held at the time of the request.

The complainant's position

32. The complainant argues that the council will hold further information falling within the scope of the request. For instance, the council has disclosed copies of emails which include references to draft copies of the council planning officer's recommendation report being attached. The complainant therefore argues that the council will hold copies of the drafts that were attached to these emails, and argues that these have not been disclosed to him.

The council's position

33. The council argues that it does not hold any further information falling within the scope of the complainant's request for information which is not subject to the exception in Regulation 12(5)(b).
34. The council argues that only one person dealt with the subject matter of the request within the planning department. It also said that no information is, or was, held in paper form. It said that searches were therefore limited to electronic records held by the specific officer concerned, using relevant dates and key words.
35. It argued that as the complainant had outlined specific items in schedule 1 of his request, searches using precise terms would have been likely to have been carried out, however it added that the relevant council officer is not currently available to clarify whether that was the case or not. Nevertheless, it concluded that sufficient searches had been carried out, and no additional searches were therefore necessary.
36. In its response to the request, the council argued that it had not searched attachments received by the council from unknown senders. It said that:

*"For your information, most if not all external emails arriving at Bristol City Council's servers are flagged with a warning message not to open attachments or any hyperlinks from unknown senders. However, a check of the response to information request sent to you dated 14 March 2023 reveal that one of the out-going attachments that should have been included was accidentally missed, this is being shared with you now."*
37. The council clarified that, as a general rule, no emails relevant to the determination of a planning application are destroyed or deleted, and there is no evidence to suggest differently in this case. It confirmed that there is a legal duty to retain such records in accordance with planning laws.

### The Commissioner's analysis

38. The Commissioner has considered the arguments of both parties and the evidence which has been provided to him.
39. Whilst the council believes that its searches would have been sufficient to locate all information falling within the scope of the request, the Commissioner notes uncertainty within its response which raises concerns in this instance.
40. In its response to the Commissioner's questions, it said that as the relevant work was carried out by one specific officer within the planning department, searches were therefore limited to electronic records held by that officer. This response indicates that it has not carried out wider searches for relevant information.
41. It said that a search of the dates and key words was undertaken, although a record of the search terms which were used was not recorded. It said that the items listed in schedule one were specific, and therefore surmised that more precise search terms could easily have been used to locate relevant information. It said, however, that as the relevant officer is currently unavailable, it could not confirm that that was the case.
42. The Commissioner also notes the council's response that it did not open attachments from unknown senders. Whilst the Commissioner notes that this may be a general security consideration in terms of the protection of its computer systems, it is unclear why the council made this statement in its response to the request to this case. The request was for correspondence between the parties, including that received by the council from the Zoo. As it would have formed part of existing and ongoing correspondence, the Commissioner considers that it would be relatively clear, even without opening the attachments, whether the emails were from the Zoo or its agents and were likely to include information and attachments falling within the scope of the request. If emails were received with attachments from the Zoo or its agents in relation to the recommendation report, then these should have been considered in its response to the request.
43. In conclusion, the Commissioner has therefore not been persuaded by the council's arguments in respect of the searches it has carried out, and considers that it has not proven, on the balance of probabilities, that no further information is held by it falling within the scope of the complainant's request for information.

44. The Commissioner has not decided that the council does hold additional information relevant to the request. He has decided that the council has provided insufficient evidence to support a conclusion that it is more likely than not that it does not hold the information requested.
45. The Commissioner therefore requires the council to carry out further adequate and appropriate searches to determine whether it holds any further information falling within the scope of the complainant's request for information, and to respond to the complainant's request for information again.
46. This decision does not preclude the possibility that its further searches will fail to locate further relevant information.



## Right of appeal

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47. 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)

48. 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.
49. 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**

## **Annex 1**

Please disclose the following documents (note that the numbers in bold and in brackets correspond with the page number in the paginated bundle of your disclosure given to me by emails at 16:23:11 on 14 March 2023):

(4). Note made of the 'scheduled Zoom meeting' referred to in the email from (name of individual redacted by ICO) dated 15 November 2022.

(6). The 'Final version' sent to the Applicant or on its behalf referred to in the email from (name of individual redacted by ICO) dated 7 November 2022 and the email or other communication by which it was sent to the Applicant or on its behalf.

(8). The 'draft report and timetable' that was 'shared... for finalisation [and] review' by the Applicant to enable it to 'respond' – referred to in the email from (name of individual redacted by ICO) dated 21 October 2022 and the email or other communication by which it was sent to the Applicant or to others on its behalf. Also any email and attachment by which it did 'respond.'

(9). Note made of the discussion on 4 August 2022 referred to in the email from (name of individual redacted by ICO) of the same date.

(11). Note made of the proposed Zoom conversation of 2 August 2022 referred to in the email from (name of individual redacted by ICO) of the same date.

(12). The 'confidential advice on my report' and the report itself referred to in the email from (name of individual redacted by ICO) dated 2 August 2022. Please note that, contrary to the assertion made on page 13 of BCC's disclosure, legal professional privilege cannot now attach. It was disclosed to the Zoo and privilege has accordingly been waived.

(14). The 'flurry of comments' to which (name of individual redacted by ICO) referred in his email to (name of individual redacted by ICO) of 1 August 2022 and the comments which he was to 'collate' and send to him the following day.

(15). '[the] suggested changes' and 'the attached' sent to 'our barrister' and referred to in the email from (name of individual redacted by ICO) to the Applicant dated 1 August 2022. Please also identify and disclose the document to which '[the] suggested changes' were to be made.

(17). Note made of the proposed call on 27 July 2022 referred to in the email from (name of individual redacted by ICO) dated 26 July 2022.

(18). The 'draft report' that was 'shared' with the Applicant and referred to in the email from (name of individual redacted by ICO) dated 14 July 2022' the

'comments' that were sent to (name of individual redacted by ICO) (as promised in her email); the email by which they were sent and 'the updated version' that she mentioned.

(20/21). 'the latest draft of the Report for Committee' (a) on which (name of individual redacted by ICO) gave the 'heads up' to (name of individual redacted by ICO) by email dated 7 July 2022 and (b) in respect of which he solicited the Applicant's 'comments and recommended amendments' [my emphasis]; and the response following the Applicant's 'review' which (name of individual redacted by ICO) promised (name of individual redacted by ICO) by email the same day.

(25). Note of the conversation proposed for 4pm on 21 June 2022 referred to in the email from (name of individual redacted by ICO) of the same date.

(45). The 'attached... comments' referred to in the email from (name of individual redacted by ICO) dated 1 August 2022 and sent at 12:24.

(46). The 'attached comments from (name of individual redacted by ICO)' referred to in the email from (name of individual redacted by ICO) dated 1 August and sent at 10:44.

(47). '(name of individual redacted by ICO)'s review of (name of individual redacted by ICO)'s report and the 'comments (name of individual redacted by ICO) has already seen from (name of individuals redacted by ICO) referred to in the email from (name of individual redacted by ICO) dated 27 July 2022.

(47). The 'note [of (name of individual redacted by ICO)] yesterday' referred to in her email of 27 July 2022.

(51/52). Note of the proposed call referred to in the emails of (name of individual redacted by ICO) and (name of individual redacted by ICO) dated 2 February 2022.