

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

Date: 15 November 2018

Public Authority: South Northamptonshire Council
Address: The Forum
Moat Lane
Towcester
Northamptonshire
NN12 6AD

Decision (including any steps ordered)

1. The complainant requested information from South Northamptonshire Council (the Council) relating to a planning application for a wind turbine and the court proceedings which resulted from that application.
2. The Council provided some information within the scope of the request but refused to provide the remainder citing regulations 12(4)(e) (internal communications) and 12(5)(b) (the course of justice) of the EIR.
3. During the course of the Commissioner's investigation, the Council disclosed further information.
4. The Commissioner's decision is that the Council correctly applied regulations 12(4)(e) and 12(5)(b) to the remaining withheld information. She is also satisfied that, on the balance of probabilities, the Council does not hold further information within the scope of the request and has therefore discharged its duty under Regulation 5(1).
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 13 November 2017, the complainant wrote to the Council and requested information in the following terms:

"Any correspondence/information from anyone sent or received from May 2014 to date, to and from yourselves relating to the application for a Wind Turbine at [address redacted] [planning application reference redacted].

Any correspondence/information from anyone sent or received from May 2014 to date, to and from yourselves relating to Court case number [case reference redacted]".

7. The Council responded on 5 December 2017. It provided links to where the information that fell within the scope of the first part of the request could be found on its website. It refused to provide information within the scope of the second part of the request, citing the following exceptions as its basis for doing so:
- Regulation 12(4)(e) - internal communications
 - Regulation 12(5)(b) - the course of justice
8. Following an internal review the Council wrote to the complainant on 16 January 2018 upholding its original position.

Scope of the case

9. The complainant contacted the Commissioner on 12 March 2018 to complain about the way his request for information had been handled.
10. It is accepted by both parties that this request relates to court proceedings which resulted from a planning application for the development of a wind turbine on land owned by the complainant. The High Court's decision was challenged and the Court of Appeal found in the complainant's favour in December 2015.
11. During the Commissioner's investigation, the Council provided her with a copy of the withheld information, identifying the names and roles of the individuals involved in the sending and receiving of the communications.
12. Also during the Commissioner's investigation, the Council disclosed further information within the scope of the request to the complainant. It confirmed its application of regulations 12(4)(e) and 12(5)(b) to the remaining withheld information.
13. Following the Council's disclosure, the complainant advised the Commissioner with respect to the scope of his complaint. He confirmed that he disputed the Council's decision not to disclose some of the

remaining withheld information, specifically information dated March 2015, December 2015 and February 2016 - "the disputed information". He considered that it was in the public interest to disclose the content of that information.

14. He also questioned the amount of information within the scope of the request.
15. In respect of one document within the disputed information, the Council considers that regulation 12(4)(e) (internal communications) applies. In respect of the rest of the disputed information, it considers that both regulation 12(4)(e) and regulation 12(5)(b) (the course of justice) apply equally.
16. The analysis below considers the Council's application of regulations 12(4)(e) and 12(5)(b) to the disputed information withheld by virtue of those exceptions.
17. The Commissioner has also considered the amount of information within the scope of the request held by the Council.

Reasons for decision

Is the withheld information environmental information?

18. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition it must be considered for disclosure under the terms of the EIR rather than the FOIA.
19. The Commissioner has published guidance¹ on regulation 2(1). That guidance states that the test that public authorities should apply is whether the information is on, or about, something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter.
20. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant parts of the definition are found in 2(1)(a) to (f) which state that it is any information in any material form on:

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

- the state of the elements of the environment and the interaction among these elements;
 - factors affecting or likely to affect those elements;
 - measures or activities affecting or likely to affect those factors or elements, or designed to protect those elements;
 - reports on the implementation of environmental legislation;
 - cost-benefit and other economic analyses and assumptions used within the framework of those measures and activities; and
 - the state of human health and safety, conditions of human life, cultural sites and built structures in as much as they are or may be affected by those elements.
21. The Council told the Commissioner that it had considered the request under the EIR on the basis that the subject matter of the court proceedings to which the request for information relates were based on an application for the development of a wind turbine. It explained:
- "As such the subject matter relates to the use of land and impact on the landscape, the quality of air, the generation of energy and noise and as such is considered to be environmental information pursuant to Regulation 2(1)(a) and (b).*
22. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
23. The Commissioner is satisfied that the withheld information in this case is 'on' issues defined within regulation 2(1) as environmental information. The Council was therefore correct to consider the information under the EIR.
24. The Council considers that regulations 12(4)(e) and 12(5)(b) apply in this case.
25. The exceptions in regulation 12(4) relate to the nature of the request or the type of information while those listed under regulation 12(5) relate to situations where disclosing the requested information would have an adverse effect.

Regulation 12(5)(b) the course of justice

26. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

"the course of justice, 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".

27. The successful application of the exception is therefore 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.
28. The fact that the information is capable of attracting legal professional privilege is not sufficient for it engage regulation 12(5)(b). For the exception to be engaged its disclosure must have an adverse effect on the course of justice.
29. As long as it can be shown that disclosure would produce an adverse effect, as specified in the exception, the exception is engaged. The extent or severity of that adverse effect is not relevant here, though it is relevant to the public interest test.
30. The term 'would have an adverse effect' is taken to mean that it is more probable than not that the adverse effect would happen.
31. In her guidance² the Commissioner recognises that the 'course of justice' element of the exception at regulation 12(5)(b) is very wide in coverage and includes material covered by legal professional privilege (LPP).
32. The Commissioner's interpretation of LPP is guided by the Information Tribunal's (now First-Tier Tribunal) description of the meaning of the concept in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023)*. The Tribunal described LPP as:

² https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchange between the client and his, her or its lawyers, as well as exchange which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."

33. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). There must be a real prospect or likelihood of litigation rather than just a fear or possibility.

34. In its submission to the Commissioner, the Council confirmed that it was relying on the first two limbs of 12(5)(b), namely the course of justice and the ability to receive a fair trial. It also confirmed that it considers that the withheld information is subject to one of the two types of privilege within the concept of LPP – namely litigation privilege. It told the Commissioner:

"... the communications in respect of which the Council has applied this exception all relate to communications between officers and members with the Council's internal solicitor and contain advice, discussion and guidance around the conduct, risks, implications and outcomes/consequences of court proceedings to which the Council was a party. As such, all of these communications are subject to legal professional privilege (litigation privilege)".

35. By way of background, the Council explained to the Commissioner that the Council had been a party to court proceedings. It told her:

" ... the communications relate entirely to that litigation between internal officers and members of the Council to inform those officers/members of the conduct, progress, risks, implications, merits and outcomes of that litigation".

36. It explained that the correspondence related to a court case which, at the time, was being litigated by various parties. It told the Commissioner:

"Whilst the Council was not an active participant in the court proceedings it was still on the court record as a party to those proceedings and it had a clear vested interest in the outcome of those proceedings".

37. In support of its view that the exception applied, the Council said:

"As a result of the nature of the correspondence and the advice/questions and discussions contained within them they are all considered to be subject to legal professional privilege on the basis of litigation privilege..."

38. The Commissioner recognises that legal professional privilege (LPP) exists to ensure complete fairness in legal proceedings. LPP protects advice given by a lawyer to a client and confidential communications between them about that advice.
39. Furthermore, the Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception and previous decisions issued by the Commissioner and the Information Tribunal have recognised that disclosure would likely prejudice this integrity.
40. Whether or not further litigation is proposed or contemplated concerning the turbine, the Commissioner is mindful of the view of the Upper Tribunal referred to in her guidance³, namely that:

"... it was relevant to take into account any adverse effect upon LPP (such as the confidence in the efficacy of LPP) and the administration of justice generally, and not simply the effect on the particular case".

41. She also recognises that the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure **would** have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed. If there is a less than 50% chance of the adverse effect occurring, then the exception is not engaged.
42. In this case, having considered the matter and having viewed the withheld information, the Commissioner is satisfied that the withheld information relates to legally privileged information and that disclosure of that information would have an adverse effect on the course of justice.
43. Accordingly, the Commissioner has concluded that the Council was entitled to engage the exception at regulation 12(5)(b) in respect of the information withheld on that basis.

³ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

Public interest test

44. In common with all EIR exceptions, the exception at regulation 12(5)(b) is subject to a public interest test. Therefore, the Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information withheld on that basis.

Public interest arguments in favour of disclosing the requested information

45. The Council recognised the public interest in transparency with regard to how it takes decisions and determines what action to take in connection with litigation.

Public interest arguments in favour of maintaining the exception

46. The Council argued that it was in the public interest that council officers are able to seek, and its legal representatives are able to provide, legal advice in a confidential manner.
47. The Council expanded those arguments in its correspondence with the Commissioner. It explained that, without the confidence that such discussions are able to be kept confidential, the Council's overall interests would be severely prejudiced. It explained that disclosure would have a negative consequence in relation to the Council's ability to make decisions on a fully informed basis. It considered that this impact on its ability to conduct its affairs would be detrimental to the interests of its residents as well as cause substantial harm to its daily operation.

Balance of the public interest arguments

48. The Commissioner accepts that there is always a general public interest in disclosure, deriving from the purpose of EIR. She also accepts that there is some public interest in disclosing information to present a full picture.
49. The Commissioner recognises that the complainant has a personal interest in this case. She has also taken into account that the proceedings in question had concluded at the time the request was submitted.
50. However, in considering where the balance of the public interest lies in the circumstances of this case, the Commissioner has given due weight to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP.
51. The Commissioner considers that there is a significant public interest in maintaining LPP due to the importance in safeguarding openness in all communications between client and lawyer to ensure access to full and

frank advice, which in turn is fundamental to the administration of justice.

52. To equal or outweigh that public interest, the Commissioner would expect there to be strong opposing factors, such as clear evidence of unlawful activity or negligence on the part of the Council. However, no such arguments appear to be present.
53. The Council has emphasised to the Commissioner the severity of the negative impact which would arise from a loss of confidence between officers of the Council and its legal adviser when seeking and providing advice on matters which are likely to be, or are, subject to litigation.
54. Having considered the withheld information and the Council's and the complainant's submissions, the Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception.
55. The Commissioner therefore finds that regulation 12(5)(b) applies and that the public interest favours withholding the information.
56. The Commissioner has next considered the Council's application of regulation 12(4)(e) to the small amount of information withheld solely by virtue of that exception: that information comprises a single email.

Regulation 12(4)(e) internal communications

57. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The purpose of this exception is to allow a public authority to discuss the merits of proposals and the implications of decisions internally without outside interference.
58. The Commissioner acknowledges that the concept of 'internal communications' is broad and covers all internal communications, not just those actually reflecting internal thinking, and will include any information intended to be communicated to others or to be placed on file where others may consult it. However, the Commissioner considers that the underlying rationale behind the exception is that public authorities should have the necessary space to think in private.
59. Regulation 12(4)(e) is a class-based exception so it is not necessary to consider the sensitivity of the information in order for it to be engaged. A wide range of internal documents will therefore be caught. However, this exception is also subject to the public interest test outlined in regulation 12(1)(b) of the EIR.

Does the withheld information constitute 'internal communications'?

60. The EIR do not provide a definition of what constitutes an internal communication. However, the Commissioner accepts that, in general, communications within one public authority will constitute 'internal communications' while a communication sent by or to another public authority, a contractor or an external adviser will not generally constitute an internal communication.
61. Having referred to the withheld information the Commissioner is satisfied that it comprises a communication sent internally within the Council.
62. It follows that she is satisfied that the information withheld under regulation 12(4)(e) comprises internal communications and that the regulation has been applied correctly to this information.

The public interest test

63. As she is satisfied that regulation 12(4)(e) is engaged in respect of the information withheld by virtue of that exception, the Commissioner has gone on to consider the public interest test attached to the application of this exception, as required by regulation 12(1)(b) of the EIR. 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.
64. When carrying out the test the Commissioner must take into account a presumption in favour of disclosure of the information which is required by regulation 12(2).

Public interest arguments in favour of disclosing the requested information

65. Arguing in favour of disclosure, the complainant told the Commissioner that he considered that the information should be disclosed for transparency and to allay any concerns that public funds may have been used inappropriately.
66. The Council acknowledged that disclosure would evidence that it was, and was seen to be, acting in a transparent and open manner and that its actions and decisions were understood and open to scrutiny.

Public interest arguments in favour of maintaining the exception

67. In essence, the public interest considerations relating to regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.

68. In this case, the Council argued that it was not in the public interest to disclose information that would undermine the confidentiality of the overall discussion.

Balance of the public interest

69. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exception. If the public interest in the maintenance of the exception does not outweigh the public interest in disclosure, the information in question must be disclosed.
70. There is no automatic or inherent public interest in withholding an internal communication: arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
71. The Commissioner recognises that there is always a general public interest in disclosing environmental information. This is derived from the purpose behind the EIR.
72. In her guidance on regulation 12(4)(e)⁴, the Commissioner acknowledges that public interest arguments:

"... should be focussed on the protection of internal deliberation and decision making processes.

This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space'".

73. She also recognises that:

"The weight of this interest will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually inform public debate".

74. The Commissioner recognises that both parties are aware that the email relates, to a greater or lesser extent, to costs claimed against third parties. The Commissioner has had the opportunity to view the withheld email. In reaching her decision in this case, the Commissioner has

⁴ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

considered the content and sensitivity of that email and the circumstances of the request.

75. In this case, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure due to the need for the Council to have full and frank discussions without fear that disclosure will take place. She therefore accepts that the internal communication in question should be withheld.

Is further information held?

Regulation 5(1)

76. Regulation 5(1) of the Act states that:

"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request."

77. During the course of the Commissioner's investigation, the complainant expressed concern regarding the amount of information held by the Council that fell within the scope of the request.
78. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of balance of probabilities, the public authority holds any information within the scope of the request (or if it was held at the time of the request). She is not expected to prove categorically whether the information is held. In making this decision, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
79. In this case, the Commissioner has sought to determine whether, at the time of the request, on the balance of probabilities, the Council held further information within the scope of the request.
80. In deciding where the balance of probabilities lies, the Commissioner will consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. She will also consider any other information or explanation offered by the public authority which is relevant to her determination.

81. In that respect, during the course of her investigation, the Commissioner asked the Council to describe the searches it carried out for information falling within the scope of the request and the search terms used. She also asked other questions, as is her usual practice, relating to how the Council established whether or not it held the requested information.
82. In its response, the Council confirmed that all relevant correspondence:
"... would have been electronic via email or on the Council's planning software database".
83. It provided the Commissioner with details of the searches it had conducted and confirmed the various search terms it had used, namely:
"[address redacted], [name redacted], wind turbine, the application reference number and the court reference numbers".
84. The Commissioner recognises that the complainant wants to be satisfied that the Council has provided her with all the relevant information in order to consider his complaint in this case.
85. From the evidence she has seen, the Commissioner is satisfied that the Council conducted relevant and appropriate searches of its records.
86. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information is held by the Council. Accordingly, she does not consider that there is any evidence that the Council failed to comply with regulation 5(1) in relation to its response to the request.

Right of appeal

87. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

88. 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.

89. 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

**Deborah Clark
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