

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

**Decision notice**

**Date:** 29 February 2016

**Public Authority:** Warwick District Council  
**Address:** Riverside House  
Milverton Hill  
Leamington Spa  
CV32 5HZ

**Decision (including any steps ordered)**

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1. The complainant has requested information about himself and his property. Warwick District Council ('the Council') released his own personal data to him under the Data Protection Act. The Council released additional information under the EIR, having redacted some. It says the redacted information is exempt from disclosure under regulation 12(4)(e) (internal communications), 12(5)(b) (legal proceedings) and regulation 13(1) (third person personal data).
2. The Commissioner's decision is as follows:
  - The Council has correctly applied the exception at regulation 12(4)(e) to some of the withheld information but the public interest favours disclosure of this information.
  - The Council has correctly applied the exception at regulation 12(5)(b) to some of the withheld information and the public interest favours maintaining the exception.
  - The Council has correctly applied the exception at regulation 13(1) to some of the withheld information.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:

- Disclose to the complainant the information it has withheld under regulation 12(4)(e).
4. The public authority must take this step 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. On 1 June 2015, the complainant wrote to Warwick District Council and requested information in the following terms:

*I request that all information, that I am reliably informed is currently held about me, [Complainant], and my property, namely [Complainant's address], by released to me using both the Freedom of Information Act and the Data Protection Act whichever is applicable depending on the information contained therein. I request that ALL information, whether it be emails, letters, memos, notes of telephone conversations, or actual conversations be released."*

6. The Council responded on 10 July 2015. At that stage it appears to have been managing the request under the FOIA. In a somewhat muddled response, the Council incorrectly said that some of the requested information was exempt from disclosure under section 40(2) of the Act because it is the complainant's own personal data. (It is section 40(1) of the FOIA that deals with requests that are for the requester's own personal data.) However, the Council released this information to the complainant under the Data Protection Act.
7. The Council also said that some of the requested information was exempt under section 40(2) of the FOIA because it is the personal data of a third person.
8. The Council went on to say that it had considered whether the request was for environmental information and should be handled under the EIR however it concluded that it was not. The Council then said that it had redacted some information from the information it was releasing because it is the personal data of third persons, and therefore exempt from disclosure under regulation 12(3) and regulation 13 (third person personal data) of the EIR "*in relation to section 40(2) of the FOIA*". The Commissioner does not consider that the Council's response was at all clear.

9. The information released under the FOIA/EIR comprises correspondence between one or more individuals and the Council and between Council staff. It concerns investigations about planning compliance and other alleged activities relating to the complainant's property. Some names, one or more addresses, text within emails and associated brief case notes have been redacted.
10. Following an internal review the Council wrote to the complainant on 17 September 2015. It released further information to him. Part of this was information that it had redacted from its original response. Part appears to be new information, some of which the Council had redacted. The Council confirmed that it was withholding information that either: falls outside the remit of the complainant's request; is exempt from disclosure under regulations 12(4)(e) and 12(5)(b); or is exempt under regulation 12(5)(f) (adversely affect interests of the person who provided the information) and regulation 13. It is not clear whether the Council's internal review response included the material it had released on 10 July 2015 or referred only to the material that it was now releasing.
11. The information released on internal review comprises correspondence between the Council and one or more individuals, and between Council staff, on the same subjects as that noted in paragraph 9.

### **Scope of the case**

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12. The complainant initially contacted the Commissioner in August 2015 to complain about the way his request for information had been handled. The Commissioner accepted the case for investigation on 20 November 2015, after the Council had undertaken an internal review.
13. During the Commissioner's investigation the Council confirmed that, with regard to its original response to the complainant, its position regarding the information it withheld under regulation 13 and regulation 12(4)(e) remains the same. The Council acknowledged that at internal review it had erroneously redacted some information under regulation 12(5)(b) that it had already released to the complainant in its original response. Finally, the Council said that it had identified some more new information that should be disclosed to the complainant. On 18 February 2016 the Commissioner advised the Council to release this information to the complainant.
14. The Commissioner has focussed his investigation, first, on whether the Council was correct to consider the complainant's information request under the EIR. Second, he has considered whether the Council correctly applied regulations 12(4)(e), 12(5)(b) to some of the redacted

information and has been prepared to consider its application of both regulation 13(1) and 12(5)(f) to other redacted information (or these four exceptions' equivalents under the FOIA if necessary). The Council has said that some of the redacted information does not fall within the scope of the complainant's request. Having seen this information, the Commissioner agrees and has therefore not included this information in his investigation.

## Reasons for decision

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### Background

15. The complainant has told the Commissioner that he is a farmer who operates a separate business alongside that activity. He says that his present property was in a bad state of repair when he purchased it and he gained planning permission to build a replacement dwelling. The complainant says that since that time, he and his wife have been the subject of continued harassment from a particular District Councillor. He says that he has had Police visits following accusations made against him but that Warwick District Council or the Police have exonerated the complainant and his wife each time a complaint that has been made against them has been investigated.

### Is the requested information environmental information?

16. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
17. The Commissioner considers the information in this case can be broadly classed as environmental information, as defined in regulation 2(1)(c) of the EIR. This says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) will be environmental information. Elements listed under 2(1)(a) include land and landscape.
18. The request is for information relating to any correspondence regarding investigations about planning compliance matters and allegations (such as removal of hedges) concerning the complainant's property. The Commissioner is prepared to accept that this information can be broadly categorised as a measure likely to affect the elements of the environment listed in regulation 2(1)(a) and that, therefore, the request falls under the EIR. The Commissioner has considered it under these Regulations.

19. Regulation 12(2) of the EIR says that a public authority shall apply a presumption in favour of disclosing environmental information.

### **Regulation 12(4)(e) – internal communications**

20. Regulation 12(4)(e) of the EIR says that a public authority may refuse to disclose internal communications. The underlying rationale behind this exception is that public authorities should have the necessary space to think in private.
21. A communication, such as an email, is an internal communication if it is a communication that stays within one public authority. Once a communication has been sent to someone outside the authority, it will generally no longer be internal.
22. The Council has applied this exception to some of the information it withheld in its internal review response to the complainant on 17 September 2015. It has provided the Commissioner with the information to which it has applied regulation 12(4)(e). The information is held in emails between Council staff, and to two instances of what appear to be brief notes of particular discussions. While the Commissioner is satisfied that the emails constitute internal communications, it is less clear that the case notes have been communicated between Council staff, and were not intended solely for the officer who wrote each note. However, he is prepared to accept that the information to which the Council has applied 12(4)(e) constitutes internal communications and is therefore exempt from disclosure under this exception.

### **Public interest test**

23. Regulation 12(4)(e) is subject to the public interest test. This says that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
24. The Commissioner asked the Council to explain in detail the arguments it considered for and against disclosure, the weight it gave to each argument and how it reached the view that the public interest in maintaining this exception, and the other exceptions it applied, outweighed the public interest in disclosure.
25. The information in question dates from March to July 2013. It concerns separate, specific planning/environmental matters relating to the complainant's property.
26. In favour of maintaining the exception, the Council has referred to safe space and chilling effect arguments in its submission to the

Commissioner. In his published guidance on 12(4)(e), the Commissioner explains that a public authority needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. However, he considers that the need for a safe space is strongest when the issue in question is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request will therefore be an important factor.

27. The Council recognises that safe space arguments are more relevant when the issues are 'live'. It acknowledges that the information to which it has applied regulation 12(4)(e) is now almost three years old and was almost two years old when the complainant submitted his request. In addition, the Council has suggested in its submission to the Commissioner that the matters that are the subject of the information have been resolved ie that there is no enforcement action pending. However, the Council says that in the email exchanges its officers are discussing the circumstances in which they may or may not take enforcement action, and the reasons why. It argues that if this were to be publicly known, it may become a means for individuals to circumvent enforcement action by taking particular actions.
28. The Council also argues that, despite the age of the material, a 'chilling effect' argument would still be relevant. It says that officers would be unlikely to provide details views on why enforcement action should or should not be taken if they are of the view that this could subsequently be disclosed. This would mean that officers would be less likely to document their thinking, which may lead to an inconsistent approach on such matters.
29. The Council has not provided any arguments in favour of disclosing the information. Despite this, the Commissioner considers there are public interest factors in favour of disclosure in this case. He has also taken into account the presumption in favour of disclosure that is required by regulation 12(2).
30. The Commissioner considers there is a public interest in the overall transparency and accountability of the Council and in members of the public having access to information that enables them to understand more clearly why and how the Council took particular decisions. This helps members of the public to challenge such decisions from a more informed position should they wish to do so.
31. In his guidance, the Commissioner observes that, as with safe space arguments, any chilling effect on internal discussions is likely to carry significantly more weight if the issue in question is still live. Once the

relevant discussions have finished, the arguments become more and more speculative as time passes.

32. With regard to the Council's safe space and chilling effect arguments, the Commissioner notes that the issues concerned were being debated two years before the complainant submitted his request and that, at the time of the request, the issues under discussion do not appear to have been live. In his view, this lessens the weight of these arguments.
33. The Commissioner has also considered the content and sensitivity of the information in question. While broadly concerning planning enforcement matters, it does not appear to be particularly sensitive. The Commissioner considers that the information does not appear to divulge any particular processes or actions that a reasonable person might not already consider that Warwick Council, or any Council, would be likely to undertake when considering planning and enforcement matters.
34. The Commissioner is prepared to accept that the Council has correctly categorised this information as internal communications. However, he is less convinced by the Council's public interest arguments for withholding the information. The Commissioner has taken into account the age of the information at the time of the request, its content and sensitivity, the public interest arguments for disclosure and the presumption in favour of releasing environmental information. On balance, he considers that, although this particular information is exempt from disclosure under regulation 12(4)(e), the public interest favours its release.

### **Regulation 12(5)(b) – legal proceedings**

35. Regulation 12(5)(b) says that a public authority may refuse to disclose information that would adversely affect formal legal proceedings, whether criminal or civil, including enforcement proceedings.
36. The successful application of the exception is dependent on a public authority being able to demonstrate that the following three conditions are met: (i) the withheld information relates to one or more of the factors described in the exception, (ii) disclosure would have an adverse effect on one or more of the factors cited, and (iii) the public interest in maintaining the exception outweighs the public interest in disclosure.
37. As discussed at paragraph 13, in its internal review to the complaint the Council redacted some information that it initially considered excepted from disclosure under regulation 12(5)(b). In its submission to the Commissioner the Council suggested that 12(4)(e) may have been a more appropriate exception to rely on, given that there was no 'live' enforcement action pending. However, the Council conceded to the

Commissioner that it had already disclosed this information in its original response and would have to "*live with this error*". Consequently, the Commissioner has not included that particular information within the scope of his investigation.

38. In its review, the Council had redacted a small amount of other information to which it said 12(5)(b) does apply: an entry entitled 'Contact with Legal' dated 20/03/2013. The Council has claimed that this information attracts legal professional privilege (LPP).
39. Legal professional privilege 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.
40. The Council has appeared to suggest that the information in question is subject to advice privilege specifically. Legal advice privilege is generally considered where no litigation is in progress or is contemplated. Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:
  - the communications must be made between a professional legal adviser and client
  - the communications must be made for the sole or dominant purpose of obtaining legal advice; and
  - the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.
41. The Commissioner has seen the information in question. He is prepared to accept that it is a record of the legal advice given by one of the Council's legal advisors to the enforcement team regarding the aforementioned planning enforcement matter, and that it attracts LPP. He therefore considers that the conditions at paragraph 40 are met.
42. The Council has told the Commissioner that it considers that disclosing this information would adversely affect the course of justice by undermining the general principles of legal professional privilege and of the administration of justice. The Council says that its enforcement team is primarily concerned with investigating whether legal enforcement action is necessary. It argues it is essential that this team can seek legal advice on individual matters without fear of subsequent disclosure. The Council considers that disclosing the information would discourage its officers from having frank and open discussions with legal advisors about enforcement matters.
43. The Commissioner notes the Upper Tribunal's decision in *DCLG v Information Commission & WR* [2012] UKUT 103 (AAC) (28 March



2012). The Tribunal said that that an adverse effect on the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. The Upper Tribunal did, however, accept that it was not a foregone conclusion that the disclosure of privileged information would adversely affect the course of justice but suggested that there would need to be special or unusual factors in play for this not to be the case.

44. With this in mind, the Commissioner is prepared to accept that, even though at the time of the request, there was no enforcement action pending and the issues were no longer 'live', disclosing the information withheld under 12(5)(b) – internal advice from the Council's legal team - would nevertheless still adversely affect the course of justice by undermining the general principles of LPP.
45. Having considered the information and the Council's submission, the Commissioner is satisfied that the first and second of the conditions at paragraph 36 are met. He is satisfied that the information relates to legal advice and that disclosing the information would have an adverse effect on the course of justice by undermining legal professional privilege. The Commissioner has finally considered the third condition at paragraph 36: the public interest arguments for maintaining the exception or disclosing the information.

#### **Public interest test**

46. The Council has not provided any specific public interest test arguments for withholding or releasing this information, despite the Commissioner's instruction at paragraph 24.
47. In the absence of any arguments from the Council, the Commissioner considers that, in relation to LPP, the strength of the public interest favouring maintenance of the exception lies in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.
48. The Commissioner accepts that the matter that is the subject of the information will be of interest to the complainant and that the matter was two years old at the time of his request. Nonetheless, the Commissioner does not consider the information to have a sufficient level of wider public interest such that it would outweigh the importance of open communications between client and lawyer, noted above. He has therefore decided that the public interest favours maintaining the exception under 12(5)(b) in this case.
49. The three conditions at paragraph 36 having been met, the Commissioner is satisfied that the Council has correctly applied the

exception at 12(5)(b) to the information it has withheld under this exception.

### **Regulation 13 (third person personal data)**

50. Regulation 13(1) of the EIR says that information is exempt from disclosure if it constitutes the personal data of a third party (ie someone other than the requester) and its disclosure would breach one of the data protection principles outlined in the Data Protection Act.
51. Regulation 13(1) is an absolute exception which means it is not subject to the public interest test.
52. Personal data is defined as data which relate to a living individual and from which they can be identified. The information to which the Council has applied regulation 13 is the name, email address and/or address of one or more individual who has complained to the Council about activities being carried out on the complainant's property. The Commissioner is satisfied that this information is the personal data of that individual/those individuals. He has gone on to consider whether disclosing this information would breach one of the data protection principles.
53. The Council has not specified which data protection principle would be breached if this information was to be disclosed. The Commissioner considers that the first data protection principle is most relevant in this case; that is, that personal data must be processed fairly and lawfully.
54. Information in support of this position – that disclosing the information would be unfair – is contained in a confidential annex to this notice.
55. Assessing whether disclosure is fair involves considering:
  - whether the information is sensitive personal data
  - the possible consequences of disclosure on the individual(s) concerned
  - the reasonable expectations of the individual(s); and
  - any legitimate interests in the public having access to the information.

These points are considered in the confidential annex.

56. As a result of his deliberations, the Commissioner is satisfied that the remaining withheld information is the personal data of a third party/third parties and that disclosing this information would be unfair to the individual/individuals concerned. Consequently he is satisfied that the Council has correctly applied regulation 13(1) to the information.

57. The Council also applied regulation 12(5)(f) to this particular information. Because the Commissioner is satisfied that regulation 13(1) applies, it has not been necessary to consider whether 12(5)(f) is also engaged.

## Right of appeal

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58. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.
60. 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** .....

**Pamela Clements**  
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