

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 April 2017

Public Authority: Carlisle City Council
Address: Civic Centre
Carlisle
CA3 8QG

Decision (including any steps ordered)

1. The complainant has requested information relating to a complaint to the Local Government Ombudsman. Carlisle City Council withheld the information under the exception for the confidentiality of proceedings, regulation 12(5)(d).
2. The Commissioner's decision is that Carlisle City Council has correctly applied regulation 12(5)(d) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 2 August 2016, the complainant wrote to Carlisle City Council (the "council") and requested information in the following terms:

"(in relation to Skelton House)

Can you send me a copy of the Ombudsmen complaint and the councils response for the above."

5. The council responded on 7 September 2016. It stated that it was withholding the requested information under the exception for the confidentiality of proceedings – regulation 12(5)(d) of the EIR.
6. Following an internal review the council wrote to the complainant on 28 September 2016. It stated that it was maintaining its position.

Scope of the case

7. On 12 October 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(d).
9. During the course of the Commissioner's investigation the council disclosed some of its correspondence with the Local Government Ombudsman (LGO) which fell within the scope of the request. The Commissioner has considered whether regulation 12(5)(d) has been correctly applied to the remaining withheld information

Reasons for decision

Regulation 12(5)(d) – confidentiality of proceedings

10. Environmental information may be exempt from disclosure under Regulation 12(5)(d) if disclosing it would adversely affect the confidentiality of a public authority's proceedings where the confidentiality arises from statute or common law.
11. The exception can only apply if it is more probable than not that the adverse effect would occur. Also, for disclosure to adversely affect the confidentiality of proceedings, the information must be part of the

business of those proceedings. The adverse effect can also be on the proceedings of another authority.

Nature of the proceedings

12. The Commissioner considers that 'proceedings' in the context of the exception are a means to formally consider an issue and reach a decision. Proceedings could include, for example, the consideration of a planning application by a planning authority, or an internal disciplinary hearing in a public authority; both of these have a degree of formality. What constitutes an authority's proceedings may be set out in statute or in its constitution or standing orders.
13. The Commissioner's guidance clarifies that proceedings could also refer to an investigation by the LGO into a complaint against a local authority.
14. The council has confirmed to the Commissioner that the withheld information relates to the LGO's investigation into a complaint made about the council. The council clarified that the complaint related to a complaint about its handling of a planning matter and, in pursuance of its investigation of the complaint, the LGO corresponded with the council.
15. The council has explained that the investigation of the complaint is formal in nature and the LGO's power to investigate such matters is set out in Part 3 of the Local Government Act 1974 (the "1974 Act").
16. In view of the council's submissions the Commissioner is satisfied that the information relates to proceedings that are formal in nature.

Confidentiality of the proceedings

17. The council has submitted that Section 28(2) of the 1974 Act provides that every investigation under Part 3 (the LGO's investigation) shall be conducted in private. It explained that section 32(2) of the 1974 Act provides that information obtained in the course of or for the purposes of an investigation under part 3 of the 1974 Act shall not be disclosed except for the purposes of the investigation. The council has argued that any correspondence between it and the LGO about a complaint to the LGO is, therefore, by law, protected by the confidentiality of proceedings.

18. The council has further argued that the bar on disclosure under the 1974 Act also extends to bodies that the LGO investigates and complainants. The council quote from an LGO complaints factsheet which states:

"...the law requires our investigations to be conducted in private. Information we obtain during an investigation must not be disclosed except for the purposes of the investigation, and for any report or decision statement issued on a complaint. This requirement applies to the complainant and the organisation complained about. So you should not provide any information about your complaint obtained from us to the media, for example."

19. The council explained that people complain to the LGO on the understanding that their information will be kept private, particularly because of the statutory provision of confidentiality. In short, the council has argued, there is an expectation of confidence surrounding the proceedings and disclosing information contained in correspondence between the LGO and the council would breach this confidentiality.
20. In view of the council's submissions and the relevant facts the Commissioner is satisfied that the proceedings in this case are subject to confidentiality provided by law.

Adverse Affect

21. Even where the proceedings are confidential in the terms discussed above, the exception is only engaged where disclosing the information would adversely affect that confidentiality. So it is not enough that the confidentiality is provided by law; there must also be an adverse effect on that confidentiality.
22. 'Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, 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, i.e. a more than 50% chance that the adverse effect would occur if the information were disclosed. If the adverse effect would only be *likely* to occur, or *could* occur, then the exception is not engaged.
23. The council has argued that the adverse effects of disclosure would be that current or potential complainants and/or witnesses would not be willing to provide information or would limit the information they provide if they thought it would not be treated in confidence. The council explained that the specific and highly localised nature of complainants to the LGO, particularly in this case which relates to a discrete planning

matter, is such that disclosing information which is in itself not personal would result in complainants being identified.

24. In addition to the council's submissions the Commissioner has also referred to previous, comparable decision notices which have addressed the issue of information relating to LGO proceedings and found that the exception has been correctly applied¹. She has also referred to the First-Tier Tribunal decision in *Dalley v Information Commissioner* (EA/2011/0180) which, in a comparable case, found that the exception was engaged².
25. In view of the above, and having referred to facts of this case and the withheld information, the Commissioner considers that the exception under regulation 12(5)(d) is engaged in respect of the withheld information.
26. Once regulation 12(5)(d) has been engaged, the public authority must then carry out the public interest test. Under regulation 12(1)(b), the 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. Furthermore, regulation 12(2) says that the public authority shall apply a presumption in favour of disclosure.

Public interest in disclosure

27. The council has argued that there is a public interest in the way the LGO operates in relation to complaints made to them and in the openness and transparency of how the LGO carries out its functions.
28. The council has also argued that there is a public interest in understanding how the council deals with complaints and the scrutiny that the LGO's investigations applies to the council's processes and practice.

¹ See, for example: https://ico.org.uk/media/action-weve-taken/decision-notices/2011/609168/fer_0349527.pdf; https://ico.org.uk/media/action-weve-taken/decision-notices/2006/361942/DECISION_NOTICE_FER65671.pdf

²

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i673/20120215%20Decision%20EA20110180.pdf>

29. The complainant has argued that the information relates to a complaint about themselves as a company so they should be able to access it.

Public interest in maintaining the exception

30. The council has amplified its submission in relation to the adverse affect to confidentiality of the LGO's investigation and argued that, as the 1974 Act provides for confidentiality in such cases, the LGO and any complainants or witnesses would have a reasonable expectation of absolute confidentiality when providing information to or receiving information from the LGO.
31. The council has argued that disclosure of the information would breach the inherent expectation of confidentiality around the proceedings and deter complainants or witnesses from providing full and frank information to the LGO because of the risk of exposure. The council considers that disclosure would also dissuade members of the public from making a complaint to the LGO, damaging the accountability and scrutiny process that the LGO's investigations provide.
32. The council argued that the public interest in this case would be served when the outcome of the LGO's investigation would be published in a decision within 3 months of completion, with any third party details being anonymised. It clarified that section 32 of the 1974 Act even prevents LGO investigators from being called upon to give evidence in legal cases other than in specified circumstances in order to protect the confidentiality of investigation information.
33. Although this decision notice is only able to consider the facts as they were at the time of the request, the council has confirmed that the LGO has subsequently decided not to publish its decision because the risk of identifying the complainant is too great. The Commissioner has had sight of correspondence between the council and the LGO in relation to the request and notes that the LGO considers that the decision not to disclose strengthens the original public interest argument in favour of withholding the information because of the risk of identifying complainants.

Balance of the public interest

34. The Commissioner is of the opinion that the arguments presented in favour of maintaining the exception do arise naturally from the nature of the exception and she has, therefore, given them due weight.
35. The Commissioner acknowledges that the complainant has a personal interest in accessing the information, however, the public interest within the context of the EIR relates to the broader public interest rather than

the interests of individuals or individual organisations. She has not, therefore, attributed much weight to this.

36. The Commissioner considers that far greater weight, however, is placed on the LGO's ability to carry out its functions effectively. The LGO relies on its ability to acquire information in order to conduct effective investigations. Disclosing this information may discourage those that have relevant information from co-operating fully and frankly with the LGO in future for fear of the public dissemination of such information.
37. The Commissioner, when considering factors that favour the maintenance of the exemption, gives significant weight to the fact that the legislator has placed in statute (section 32(2) of the 1974 Act) that information received by the LGO during a relevant investigation shall not be disclosed except in specified limited circumstances.
38. The Commissioner recognises that the public interest arguments in favour of maintaining the exception provide a high threshold which needs to be surpassed before a decision in favour of disclosure would be made. The Commissioner's decision in this case is that that the threshold has not been met.
39. The Commissioner has, therefore, concluded that the exception is engaged and that the balance of the public interest favours maintaining the exception.

Right of appeal

40. 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

41. 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.

42. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF