

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 January 2024

Public Authority: City of Bradford Metropolitan District Council

Address: Britannia House
Hall Ings
Bradford
BD1 1HX

Decision (including any steps ordered)

1. The complainant requested information relating to the City of Bradford Metropolitan District Council's (the Council) appeal against the Department for Culture Media and Sport's (DCMS) decision to list the Richard Dunn Sports Centre. The Council withheld the information requested under regulation 12(4)(e) (internal communications) of the EIR. During the course of the Commissioner's investigation the Council disclosed the withheld information, subject to some personal data being redacted under regulation 13 (third party personal data) of the EIR. Following this disclosure the complainant alleged that the Council held further information which it had not disclosed. The Council subsequently located additional information, which it disclosed to the complainant, subject to some information being redacted under regulations 12(4)(e), 12(5)(b) (course of justice) and 13.
2. The Commissioner's decision is that the Council has correctly applied regulation 12(4)(e) to the request. However, the Commissioner also finds that the Council has failed to demonstrate that regulation 12(5)(b) of the EIR is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(5)(b).

4. The public authority 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

5. On 22 March 2023, the complainant wrote to Council and requested information in the following terms:

“Please could I request all internal correspondence sent by Bradford Council staff (including councillors or council chiefs and leaders) relating to the Council's appeal against the DCMS' decision to list the Richard Dunn Sports Centre? I would like this in the form of a PDF”.
6. The Council issued a refusal notice on 19 April 2023 stating that the information requested was exempt under regulation 12(4)(e) of the EIR.
7. On 19 April 2023 the complainant requested an internal review of the Council's refusal to provide the information. They pointed out that the Council had previously disclosed internal correspondence about the same building in relation to an earlier information request.
8. The Council provided the outcome of its internal review on 27 June 2023 and upheld its decision that regulation 12(4)(e) applied to the request.

Scope of the case

9. The complainant contacted the Commissioner on 11 July 2023 to complain about the way their request for information had been handled.
10. During the course of the Commissioner's investigation the Council disclosed the withheld information, subject to some personal data being redacted under regulation 13 (third party personal data) of the EIR.
11. Following this disclosure the complainant alleged that the Council held further information which it had not disclosed or considered for disclosure.
12. The Commissioner made further enquiries with the Council, following which it located additional information falling within the scope of the request. This information was disclosed to the complainant, subject to

some information being redacted under regulations 12(4)(e), 12(5)(b) and 13.

13. The complainant did not challenge the Council's application of regulation 13 to the personal data it withheld in the first batch of information it disclosed. As such, the Commissioner has not considered the Council's application of regulation 13 to any information in this notice.
14. In light of the above, the Commissioner's decision is to determine whether the Council correctly applied regulations 12(4)(e) and 12(5)(b) to the remaining withheld information.

Reasons for decision

Regulation 12(4)(e) – internal communications

15. Regulation 12(4)(e) provides an exception for information which constitutes an 'internal communication'. In order for the exception to be engaged it needs to be shown that the information in question constitutes a communication within one public authority, specifically, the authority to which the request is made.
16. Regulation 12(4)(e) is a class-based exception. There is no need to consider the sensitivity of the information to engage the exception. However, the exception is subject to the public interest test.
17. The withheld information in this case comprises parts of internal emails between Councillors and officers relating to the appeal against the decision to list the Richard Dunn Sports Centre and discussions around responding to press enquiries concerning the decision to list the building. The Council stated that it did not consider some of the information withheld under regulation 12(4)(e) to fall within the scope of the request as the information does not relate to the Council's appeal against the decision to list the Richard Dunn Sports Centre. Instead, this out of scope information comprises of internal discussions about how to respond to press enquiries the Council received about the subject matter.
18. Having viewed the information withheld under regulation 12(4)(e) the Commissioner does not accept the Council's view that some information is out of scope of the request. The Commissioner notes that the request is worded as being for all internal information *relating to* the appeal. As such the Commissioner considers that internal correspondence relating to press enquiries about the appeal falls within the scope of the request.
19. The Commissioner is satisfied that the information that the Council has withheld under regulation 12(4)(e) falls within the definition of internal

communications, therefore the exception is engaged. The Commissioner has gone on to consider the public interest test.

Public interest test

20. The Council acknowledges that there is a general public interest in transparency and accountability. The Council also accepts that the Richard Dunn Sports Centre has "strategic importance for the city's future and it is in the public interest how public money such as repairs and security for the site is spent". However, the Council pointed out that it has already disclosed information relating to public expenditure on repairs and security for the site in question.
21. The Council considers that there is a significant public interest in maintaining a safe space to safeguard private thinking, away from external interference and scrutiny. The Council argues that disclosure of the withheld information would inhibit the free and frank exchange of views. This loss of candour and frankness would damage the quality of advice and discussions in respect of its decision making processes, particularly where in this case the information relates to "high profile matters". The Council does not consider this to be in the public interest.
22. The Commissioner acknowledges that there is a public interest around transparency in relation to the decision to list the Richard Dunn Sports Centre, particularly in light of the impact that it has on the Council's plans for the site. The Commissioner notes that there has been considerable local and media interest about the future of the site, including the decision to list it.
23. However, the Commissioner accepts that public authorities need a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. Arguments about "chilling effects" and the "safe space" are at their strongest when the issues involved in the internal communication are still live. The Commissioner notes that, in this case, matters relating to the site in question were ongoing. The Commissioner therefore considers that the issue was live at the time of the request.
24. In reaching a decision in this case the Commissioner has also taken into account the fact that the Council has disclosed a significant amount of information relating to the request. He considers that this goes some way to satisfying the public interest in disclosure.
25. Taking into account all the circumstance of this case, whilst he acknowledges that the subject matter associated with the request has been the subject of local and media interest, the Commissioner's decision is that the public interest in maintaining the exception at

regulation 12(4)(e) outweighs that in disclosure and the Council is therefore entitled to withhold the information under regulation 12(4)(e).

26. 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. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019): "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
27. In this case, the Commissioner's view is that the balance of the public interest favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(e) was applied correctly.

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

28. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so 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.
29. The Commissioner considers that the course of justice element of the exception is wide in coverage and accepts that it can include information about civil investigations and proceedings. The successful application of the exception is 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.
30. The Commissioner's guidance on the application of regulation 12(5)(b) confirms that the exception will be likely to be engaged if the information in question is protected by legal professional privilege (LPP). This is due to the adverse effect on the course of justice that would

result through the disclosure of, otherwise confidential, information covered by LPP.

31. In this case, the Council has withheld parts of three emails on the basis that the information is subject to LPP, specifically advice privilege.
32. The Commissioner has viewed the withheld information and notes that it comprises of exchanges between a solicitor and a client. However, the fact that the sender or recipient of a piece of correspondence has a legal qualification does not automatically mean that the correspondence is privileged. As confirmed in the Commissioner's guidance on section 42 of the Freedom of Information Act 2000 (Legal Professional Privilege)¹:

"The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns such as advice on legal remedies to a problem".
33. The Commissioner is unable to go into detail in this notice about the content of the withheld information, as to do so would reveal its content. However, the Commissioner considers that some of the information withheld under regulation 12(5)(b) relates to an operational matter as opposed to legal rights, liabilities, obligations or remedies. The other withheld information does not reveal any legal advice provided or the basis on which legal advice was sought. As such, the Commissioner does not accept that any specific legal advice is revealed within any of the withheld information.
34. In order to engage the exception at regulation 12(5)(b) disclosure must adversely affect the course of justice. In terms of any adverse affect there must be an identifiable harm to or negative impact on the interests identified in the exception. Furthermore, the threshold for establishing adverse effect is high, since it is necessary to establish that disclosure **would** have an adverse effect. 'Would' means that it is more probable than not, so there must be 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, the exception is not engaged.
35. Having regard to the actual content of the information that the Council has withheld under regulation 12(5)(b) the Commissioner does not

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/>

consider that the Council has sufficiently demonstrated that disclosure of the information in question would have an adverse affect on the course of justice.

36. Given that the Council has failed to demonstrate why disclosure would adversely affect the course of justice, the Commissioner concludes that the exception 12(5)(b) of EIR is not engaged.
37. As the exception is not engaged it is not necessary for the Commissioner to go on to consider the public interest test.

Right of appeal

38. 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

39. 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.
40. 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

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