

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

### **Decision notice**

**Date:** 11 September 2024

**Public Authority:** Cheshire West and Chester Council  
**Address:** 58 Nicholas Street  
Chester  
CH1 2NP

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

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1. The complainant requested various information in respect of a boundary wall at the rear gardens of a row of properties including reports that Cheshire West and Chester Council, ('the Council') have commissioned regarding the wall. The Council refused the request citing regulation 12(5)(b) (the course of justice) to withhold the information. During the course of the Commissioner's investigation, the Council wrote to the complainant confirming that it does not hold information in respect of item two of the request. The Commissioner's decision is that some of the information constitutes the complainant's own personal data, and as such, regulation 5(3) of the EIR applies. The Commissioner has also determined that the Council correctly applied regulation 12(5)(b) to the withheld information. The Commissioner does not require any steps.

#### **Request and response**

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2. On 16 October 2023, the complainant wrote to the Council and requested the following information:  
  
"Approximately 5 years ago the Building Control Department of Cheshire West and Chester raised issues regarding the structural integrity of a retaining wall on a shared boundary between the highway

and the rear gardens of a row of terraced houses, numbers 1-17 [address redacted]. I am the owner of [address redacted].

The most recent correspondence on this matter was a letter from the Building Control Department to me dated 26 September 2023. My reply ...has not been acknowledged and I have not received a reply.

Therefore, under the Freedom of Information Act 2000, I request the following information ...regarding my property, [address redacted]:

1. Any evidence which confirms the legal ownership of the boundary retaining wall referred to above.
2. Any information that the original design and specification of the retaining wall (referred to above) received building regulation approval before its original construction and that its construction was in accordance with the prevailing building regulations and subsequently received the approval of the public authority.
3. A copy of all reports (including associated structural calculations) that Cheshire West and Chester have commissioned regarding the retaining wall (referred to above) including (but not limited to) the report referred to in their letter to me dated 26 September, 2023."
3. The Council responded on 9 November 2023. It stated that it had considered the request under the EIR and cited regulation 12(5)(b) to withhold the requested information.
4. Following an internal review the Council wrote to the complainant on 25 November 2023. It upheld its original response.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 15 March 2024 to complain about the way their request for information had been handled. The complainant is not satisfied with the Council's response and considers that they merely asked it to provide the evidence that it says it holds to insist that they pay the Council to demolish and rebuild the wall at the end of their garden.
6. Having viewed the withheld information, the Commissioner considers that some of the information requested constitutes the complainant's own personal data. For clarity, a requester's own personal data is exempt under regulation 5(3) of the EIR. Personal data is defined by the Data Protection Act 2018 (the DPA) as any information relating to a living and identifiable individual. The separate right of access provided

by article 15 of the General Data Protection Act (the GDPR) therefore applies.

7. During the course of the Commissioner's investigation, the Council also wrote to the complainant confirming its revised response to item 2 of the request and stated that it does not hold relevant information. The complainant has confirmed that they are satisfied with this response.
8. In light of the above, the scope of the Commissioner's investigation is to consider whether the Council correctly withheld information relevant to the request in respect of items 1 and 3 of the request.

## **Reasons for decision**

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### **Regulation 5(3) – the complainant's own personal data**

9. Regulation 5(3) of the EIR provides that where a request for information constitutes the personal data of which the applicant is the data subject, that information is exempt from the duty to disclose provided for under regulation 5(1).
10. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
11. The two main elements of personal data are therefore that the information must relate to a living person, and that the person must be identifiable.
12. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data or an online identifier; or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
13. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
14. The Commissioner notes that the complainant and the complainant's address are referred to by name in the report in question. The complainant is clearly therefore identifiable from the information and the information is significant and biographical to them. The Commissioner is satisfied that this information constitutes the complainant's own personal data and finds that the exception at regulation 5(3) of the EIR is engaged in relation to this information and the Council was not obliged by the EIR to disclose the information in question.

15. The Commissioner notes that the remaining withheld information could be released without disclosing the complainant's own personal data. He has therefore gone on to consider whether regulation 12(5)(b) of the EIR applies to the information contained within the withheld information which does not constitute the complainant's own personal data.

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

16. Regulation 12(5)(b) states that a public authority may 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. It is a broad based exception with the course of justice including but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
17. In this case, the Council has withheld information on the basis that it is covered by LPP.
18. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
19. In this case, the Council has withheld five documents which comprise either legal advice from Counsel, regarding matters relating to the wall in question, or the documents the Council has confirmed were commissioned with a view to establishing the condition of the wall and thereafter legal proceedings. It has confirmed that it is relying on litigation privilege.
20. The Council has confirmed that the withheld information is live as matters relating to the wall in question are still under consideration.
21. The Commissioner has viewed the withheld information and he is satisfied that the information is subject to legal professional privilege, specifically litigation privilege. Furthermore, the Commissioner is not aware of any evidence suggesting that this privilege has been waived.
22. As the withheld information is subject to LPP and relates to a live matter, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and

therefore finds that the exception at regulation 12(5)(b) is engaged. The Commissioner will now go on to consider the public interest test.

### **Public interest test**

#### Factors in favour of disclosure

23. The Council acknowledges the general principle that disclosure of information promotes accountability and transparency to maintain confidence and trust in public authorities.
24. More specifically in this case, the Council has acknowledged that the investigation is publicly funded and disclosing the information will aid the public's evaluation as to whether money has been well spent.

#### Factors in favour of maintaining the exception

25. In terms of the public interest in maintaining the exception at regulation 12(5)(b), the Council considers that there is a high public interest in protecting the effective investigation of damage to structures or buildings still under review, where releasing information may be detrimental to parties involved including the Council itself.
26. The Council also considers that disclosure of the information may prejudice the course of justice by releasing information into the public domain outside of the investigation. It has also argued that disclosure may compromise any future proceedings.

#### The Commissioner's conclusion

27. In balancing the opposing public interest factors in this case, the Commissioner acknowledges that there will always be a general public interest in transparency and accountability to understand more clearly why particular decisions have been made, and certain processes followed.
28. In this case, the Commissioner accepts that disclosure would provide the public with information to allow them to better understand decisions the Council has taken in relation to the wall in question. He also notes that the complainant has a personal interest in the subject matter as they own a property adjoining the wall in question. However, this has to be weighed against the very strong public interest in-built in maintaining the principle behind LPP.
29. LPP is a fundamental principle of justice, and it is the Commissioner's well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of

clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.

30. To equal or outweigh the public interest in maintaining a claim of LPP, the Commissioner would expect there to be strong opposing factors, such as circumstances where substantial amounts of public money are involved, where a decision will affect a significant number of people, or evidence of misrepresentation, unlawful activity or a lack of appropriate transparency. In the circumstances of this case the Commissioner is not satisfied that any of these factors are present to the extent that the strong public interest in protecting the principle of LPP is outweighed.
31. The Commissioner also notes that at the time of the request, the legal advice was recent and directly related to an on-going investigation regarding the wall in question.
32. On balance therefore, the Commissioner does not consider that, in this case, there are sufficient or compelling enough arguments in favour of disclosure which would override the inbuilt public interest in information remaining protected by LPP. The Commissioner's decision is therefore, that the balance of the public interests favours the exception being maintained.
33. 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).
34. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(4)(d) outweighs the public interest in disclosure of the information. 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)(d) was applied correctly.

## **Right of appeal**

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35. 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)

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Catherine Dickenson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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