

The course of justice and inquiries exception (regulation 12(5)(b))

Environmental Information Regulations

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1. The Environmental Information Regulations 2004 (the EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of the EIR can be found in [The Guide to the Environmental Information Regulations](#)

3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and to promote good practice.
4. This guidance explains to public authorities the main provisions of regulation 12(5)(b) and how to apply them.

Overview

- Regulation 12(5)(b) provides an exception from the disclosure of environmental information which would adversely affect :
 - the course of justice;
 - the ability of a person to receive a fair trial; and
 - the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
- The course of justice has a wide meaning and public authorities may wish to consider claiming this exception when they get requests for :
 - court or tribunal records;
 - material covered by legal professional privilege; and
 - information whose disclosure would prejudice investigations and proceedings of either a criminal or disciplinary nature.
- There is a presumption in favour of disclosure.
- The public authority must weigh the public interest arguments for maintaining the exception in regulation 12(5)(b) against those for disclosure.

What the EIR say

Regulation 12 (5)

For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

.....

(b) 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;

.....

General principles of regulation 12(5)(b)

5. Under EIR regulation 5(1), public authorities are under a duty to make available environmental information that has been requested. Regulations 12(4) and 12(5) provide exceptions to this duty.
6. The exceptions under regulation 12(5) allow a public authority to refuse to disclose environmental information where "its disclosure would adversely affect" the interests listed in each exception.
7. The public authority must apply a presumption in favour of disclosure, both in engaging the exception and in carrying out the public interest test.
8. A public authority cannot refuse to confirm or deny whether information is held under regulation 12(5)(b).

Adverse effect

9. Regulation 12(5)(b) allows a public authority to refuse to disclose information "to the extent that its disclosure would adversely affect" the course of justice, etc. "Adversely affect" means 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 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.

10. For further discussion of the adverse effect test under the EIR, please refer to the ICO's guidance: [How exceptions and the public interest test work in the Environmental Information Regulations](#).

The broad coverage of regulation 12(5)(b)

11. As described above, the exception in regulation 12(5)(b) is broad in coverage; its remit encompasses any adverse effect upon 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 or investigation of a criminal or disciplinary nature. This guidance expands on the meaning of these terms below.

The course of justice

12. The course of justice element of this exception is very wide in coverage. The other aspects listed in the exception: "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" are, in practice, sub-sets of the course of justice and may therefore be argued under the general course of justice heading, rather than being distinct provisions.

This guidance does not attempt to provide a definitive list, but public authorities may wish to consider applying this exception to requests for the following types of information:

- material covered by legal professional privilege (LPP);
- information about law enforcement investigations or proceedings. This would cover the obvious example of information about a police investigation but could also include information about other types of civil and criminal investigations and proceedings, such as those carried out under planning or charity law, or those related to tax collection, immigration controls and health and safety regulations; and
- records of courts, tribunals and inquiries.

Example

In [Rudd v the Information Commissioner & the Verderers of the New Forest \(EA/2008/0020, 29 September 2008\)](#), the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'".

Legal professional privilege and 'without prejudice' correspondence

The meaning of legal professional privilege

13. 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. For a more detailed explanation and discussion of its principles, please see the ICO's FOIA guidance: [Section 42: Legal Professional Privilege](#).
14. The Information Tribunal considered the application of LPP under the EIR in the following case:

Example

[Kirkaldie v Information Commissioner & Thanet District Council \(EA/2006/0001, 4 July 2006\)](#)

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation."

Information subject to LPP

15. For regulation 12(5)(b) to apply to legally privileged information, the public authority must demonstrate that disclosure of the requested information would have an adverse effect on the course of justice.

16. The following two case examples illustrate different ways in which there might be an adverse effect.
17. The first case demonstrates how the disclosure of information protected by LPP could undermine a court case and thereby have an adverse effect upon the course of justice.

Example

In ICO Decision Notice [FER0414615](#) the complainant had requested information from Cheshire East Council about a planning enforcement file. The Commissioner agreed that the withheld information was subject to legal professional privilege, which may be protected from disclosure under regulation 12(5)(b). He then went on to determine whether or not disclosure would adversely affect the course of justice.

He said: “disclosure of the withheld information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information when the case is still ‘live’. Disclosure of the advice would provide an indication of the arguments, strengths or weaknesses which the council might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out. The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.”

18. The second case is a decision of the Upper Tribunal and therefore sets a precedent. The Upper Tribunal stated that an adverse effect upon 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 also accepted 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.

Example

In [DCLG v Information Commissioner & WR \[2012\] UKUT 103 \(AAC\) \(28 March 2012\)](#), case number GIA/2545/2011, the Upper Tribunal considered the significance of LPP under the EIR, allowing the appeal by DCLG and re-making the decision of the First Tier

Tribunal.

The Upper Tribunal (UT) said 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.

The UT agreed with arguments that: "it would be possible to conclude that the course of justice would not be adversely affected if disclosure were to be directed only by reason of particular circumstances, (eg that the legal advice is very stale), such there would be no undermining of public confidence in the efficacy of LPP generally" and "whether [regulation]12(5)(b) is engaged, in the case of information protected by LPP, must be decided on a case by case basis.."

Information marked 'without prejudice'

19. In correspondence relating to litigation, the term 'without prejudice' is often marked on correspondence as part of negotiations on a settlement. Rules about 'without prejudice' exist as a matter of public policy to encourage attempts at informal resolution of legal disputes, without fear of any offers or admissions being used against the parties in a subsequent court case and with the aim of streamlining the legal process while ensuring that fair trials are not undermined. 'Without prejudice' protection for information on negotiations continues even after a settlement is agreed, but obviously will no longer apply to the actual terms of the agreement once they have been finalised.
20. Under the EIR, public authorities may potentially be able to except information that is marked 'without prejudice' in negotiations under regulation 12(5)(b), by virtue of the broad term "the course of justice" in the exception, rather than specifically by means of LPP. In order for the regulation 12(5)(b) exception to apply to such information, a public authority must demonstrate that the negotiations were genuine 'without prejudice' negotiations in an attempt to settle a legal dispute. It must also be able to demonstrate that disclosure would adversely affect the course of justice, either through an undermining of confidence in the general principle of 'without prejudice' negotiations or through prejudice to specific negotiations.

Law enforcement, investigations and proceedings

21. We consider that the principle of an adverse effect on the course of justice is wide enough to cover any adverse effect on law enforcement and investigations and proceedings. This would include the work of obvious law enforcement authorities such as the police and HM Revenue and Customs, but might include the work of such organisations as the UK Border Agency. Investigations and proceedings within the terms of regulation 12(5)(b) could be conducted by bodies such as the Charity Commission.
22. The following example decision notice demonstrates the sort of issues to consider when considering information about criminal investigations under regulation 12(5)(b).

Example

In ICO Decision Notice [FS50080372](#) the Information Commissioner considered the refusal of a request for information made to Warwickshire Police. The information concerned the latter's investigation into allegations that the decision to grant planning permission for ground close to the complainant's property was made improperly. The Commissioner considered two strands of the application of regulation 12(5)(b): that relating to legal professional privilege and that relating to information held for the purposes of criminal investigations. In this example we are looking at the investigations aspect.

The Commissioner was not persuaded by arguments that disclosure would inhibit police officers from exchanging their views if information about their investigations were released. However the Commissioner accepted that disclosure could hinder the authority's ability to find witnesses willing to participate in investigations, once they knew that their contributions could be disclosed. This could adversely affect the authority's ability to conduct criminal investigations. He accepted that release of the information could reveal how the authority conducted investigations – awareness of its techniques could enable suspects to evade detection or conviction. He also took into account the fact that the investigation was conducted relatively recently; despite the fact that the case was closed, the police techniques were still current and the witness statements were recent. Release of the information could adversely affect future investigations.

Ability of a public authority to conduct an inquiry of a criminal or disciplinary nature

23. This guidance has already said that this element of regulation 12(5)(b) is a sub-set of the course of justice.
24. The following case concerned an investigation and entailed a detailed consideration of the likelihood of any adverse effect.

Example

In ICO Decision Notice [FS50301488](#), the complainant had requested from Ofcom copies of the findings of any independent tests commissioned by the public authority to establish if any home networking Power Line Telecommunication (PLT) devices complied with the essential requirements of the Electromagnetic Compatibility Directive (EMC).

The authority initially withheld the information under FOIA, but, following the Information Commissioner's instruction to reconsider it under EIR, withheld the information on the basis of regulation 12(5)(b).

Ofcom explained that the report consisted of evidence it obtained as part of a criminal investigation into allegations that a criminal offence had been committed under the EMC regulations. It had decided not to prosecute; nevertheless it was possible that the investigation could be reopened if new evidence was to emerge in the future.

The Commissioner decided that, in the circumstances, the applicable part of the exception was in respect of the possible adverse effect on the ability of the public authority to conduct an inquiry of a criminal or disciplinary nature. He was satisfied that regulation 12(5)(b) was the correct exception to consider.

He found that disclosing the disputed information would adversely affect the ability of the public authority to conduct investigations pursuant to the EMC regulations. This was especially in relation to the 'live' nature of the subject matter and the risk of revealing information relating to its investigation strategy.

Court and tribunal records

25. As already discussed, regulation 12(5)(b) is a broad exception which encompasses any adverse effect on the course of justice. This will be wide enough to cover an adverse effect caused by the disclosure under the EIR of court records and information held for the purpose of an inquiry or arbitration.
26. Outside the realms of FOIA and the EIR, the appropriate court procedure rules, such as the Civil Procedure Rules and Criminal Procedure Rules, provide an access regime for court and tribunal records. Circumventing the jurisdiction of the appropriate court procedure rules by allowing access to court records under the EIR could potentially adversely affect the course of justice because parties involved in judicial proceedings have the expectation that such information will only be disclosed under the established regime of those rules. Disclosing information under the EIR instead might undermine general confidence in the judicial or inquiry system or might prejudice an individual ongoing case.
27. However although the disclosure of court records (etc) will sometimes undermine the course of justice, this is not a foregone conclusion. It will depend upon the circumstances of the case; for instance, the nature of the requested information and whether the court has already allowed its disclosure.

The ability of a person to receive a fair trial

28. The importance of this element of regulation 12(5)(b) is highlighted by the fact it is listed separately within the exception. However, as outlined above, it is encompassed within the overall concept of the course of justice.

Example

The Tribunal considered the application of regulation 12(5)(b) to information relating to the ability of a person to receive a fair trial in [Watts v the Information Commissioner \(EA/2007/0022, 20 November 2007\)](#). The request was for environmental health officers' reports on the premises of a named meat supplier. This request had arisen after contaminated meat had led to an outbreak of E.Coli and the death of a child.

At the time of the request, criminal proceedings against the owner of the premises in question had not yet commenced. The issue here

was whether the exception in regulation 12(5)(b) applied to the request, on the basis that it would jeopardise the individual's chances of a fair trial. In the special circumstances of this case, the Tribunal found that disclosure of the information would not have done so. However the Tribunal's comments are relevant.

The Tribunal asserted that the criterion for engaging this aspect of regulation 12(5)(b) is whether disclosure "would adversely affect ... the ability of a person to receive a fair trial". It went on to consider this factor and stated: "A public authority (whether or not requested by the police authorities to retain information) ought to give careful consideration to the potential effect on the criminal proceedings of the particular information being requested before refusing a request for disclosure. It should obviously adopt a cautious approach in making the assessment because of the importance of not prejudicing a fair trial in criminal proceedings, but if, on a sensible reading of the documentation in question, its disclosure would not adversely affect the prospects of a fair trial, then the fact that the information has some connection with the subject matter of a prosecution will not be sufficient justification for non-disclosure."

The public interest test

29. Once an authority has established that regulation 12(5)(b) is engaged, it then needs to apply the public interest test (PIT). The public interest arguments will be different, depending on the reasons for engaging the exception. For more details on the application of the public interest test under the EIR, please refer to the ICO's guidance [How exceptions and the public interest test work in the Environmental Information Regulations](#).
30. This part of the guidance lists some of the PIT factors to consider in relation to different types of information. This list is not intended to be exhaustive.
31. The public interest inherent in this exception will always be strong due to the fundamental importance of the general principle of upholding the administration of justice.
32. However it is important to consider the facts of each case; the public interest arguments will not automatically weigh in favour of maintenance of the exception.

33. A public authority must also take into account the strong public interest in transparency as to how justice is administered. The often quoted phrase “justice must be seen to be done” is relevant here.

Applying the PIT to cases concerning LPP and 'without prejudice' correspondence

34. 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.
35. The DCLG decision of the Upper Tribunal (UT) discussed earlier, highlights some of the PIT factors that might apply when a public authority considers a request for legally privileged information.

Example

[DCLG v Information Commissioner & WR \[2012\] UKUT 103 \(AAC\) \(28 March 2012\)](#), case number GIA/2545/2011.

Two particular conclusions reached by the UT in the circumstances of this case were as follows:

- The UT accepted the submission that the risk of the disclosure of legally privileged information, leading to a weakening of confidence in the general principle of LPP, was a public interest factor of “very considerable weight” in favour of maintaining the exception. It added that there would have to be “special or unusual factors” in a particular case to justify not giving it this weight and in this case there were none.
- The UT also found that disclosure would be unfair as legal proceedings were a possibility in this particular case. It was important to maintain a level playing field and disclosure of the public authority’s legal advice to the requester would be unfair unless the authority had “the corresponding benefit”.

36. There is a strong inbuilt public interest in favour of maintaining regulation 12(5)(b) for information that is properly marked ‘without prejudice’, in order to encourage the use of informal settlement as a method of solving disputes. Even more weight will be attached to information that is also protected by LPP. The timing of a request will affect the application of the public

interest test, since the public interest in favour of maintaining the exception will be much stronger in a situation where 'without prejudice' negotiations are recent or ongoing, or before an agreed settlement or the conclusion of a court case.

Applying the PIT to cases involving civil and criminal investigations, proceedings and inquiries

37. The public interest favouring maintenance of the exception in these cases is in not prejudicing investigations, proceedings and inquiries.
38. The timing of a request for information about an investigation may be a relevant factor. For instance, when applying the PIT, an authority should consider whether there is a need to protect information acquired during investigations, especially when an investigation is still open. Even if the investigation is closed, the age of the information is relevant (for example, if witness statements were given recently).
39. When applying the public interest test to the investigation of a crime or a civil matter, an authority should consider factors such as
 - the stage or stages reached in any particular investigation or proceedings;
 - whether and to what extent the information has already been released into the public domain;
 - the significance or sensitivity of the information;
 - any available independent evidence on whether the investigation has been properly conducted; and
 - the age of the information.
40. Levels of interest to the public and the distress of individuals associated with the case are not relevant factors under this exception.

Applying the PIT to cases concerning court and tribunal records

41. There are strong public interest arguments in favour of maintaining the exception for these types of information. These include the public interest in preserving public confidence in the judicial system and upholding the existing access regime provided by the court procedure rules. It would not be in the public interest for the EIR to circumvent access regimes created specifically to address the disclosure of court records and to undermine the authority of the judiciary by doing so, especially where cases are ongoing.
42. It is therefore essential to consider each scenario on a case by case basis, taking into account factors such as the content of the information, the timing of the request, whether the information is also held for another purpose unconnected to court proceedings, and the accessibility of the information.
43. On the question of timing of a request, during litigation proceedings or an inquiry, the public interest in preserving the course of justice will often be paramount. Once the proceedings are over, but there is still a real prospect of future litigation, a weighty public interest in maintaining the exception will still remain.
44. In cases where information is also held for other purposes, the facts of the case are again key. If information exists in its own right outside the court or tribunal records this might mean it is less sensitive or that some or all of it is already in the public domain. These facts will help a public authority to decide whether there is a reduced weight in favour of maintaining the exception.

Example

In ICO decision notice [FS50396004](#), the complainant had requested from the public authority information about pollution incidents on the Six Mile Water in Northern Ireland. The public authority had refused part of the request, applying the regulation 12(5)(b) exception to reports of pollution incidents that had resulted in prosecutions, on the basis that disclosure would adversely affect the course of justice.

The Commissioner found that the public authority held the information solely as evidence for the purpose of court proceedings regarding pollution incidents. Access to such documents is strictly controlled under the Magistrates' Courts Rules and to circumvent that regime would have an adverse effect upon the course of justice because it would undermine public confidence in the judicial system.

The Commissioner then considered the public interest test (PIT). Despite the general presumption in favour of disclosure under the EIR, and the strong arguments in favour of transparency in this case involving damage to the environment and the accountability of public authorities, he decided that "the very strong public interest in maintaining the exception outweighs the public interest in disclosure".

The decision notice recorded that in making this decision on the PIT, the Commissioner considered "the timing of the request, the accessibility of the information and the purposes for which it was held". He added that where a request for information is made while a court case is ongoing: "the public interest in preserving the course of justice, by avoiding prejudice to an ongoing case, will usually be paramount. The Commissioner is satisfied that proceedings were still ongoing at the time of the request and that therefore the public interest in avoiding prejudice was paramount". However, he noted that if the authority held information for any purpose other than court proceedings, this might mean it was less sensitive and might therefore weaken the public interest in non-disclosure. In this case the Commissioner accepted "the Department's assertion that the information in this case is held solely for the purpose of court proceedings. He is satisfied that it is not otherwise accessible to the public as access to the information is governed very strictly by judicial rules".

Key differences between regulation 12(5)(b) and related provisions in FOIA

45. Regulation 12(5)(b) has some relationship to FOIA sections 30, 31, 32 and 42; but there are no direct equivalents and there are differences between the coverage of each piece of legislation.
46. Further guidance on FOIA exemptions is available via the ICO website in the [Guidance index](#) and the [Guide to the Freedom of Information Act 2000](#).
47. In particular, regulation 12(5)(b) encompasses a wider range of information than the individual FOIA exemptions. However, for the EIR exception to apply the threshold is higher, since in order to engage it the public authority must demonstrate that “disclosure would adversely affect” the interests listed in the exception.
48. There is an explicit presumption in favour of disclosure under the EIR (regulation 12(2)) in contrast to FOIA. Whilst it is important to acknowledge this difference, the ICO view is that the distinction should not be overstated, and that in effect there is also a presumption in favour of disclosure in FOIA.
49. Unlike FOIA exemptions, **all** exceptions under the EIR are subject to the public interest test.
50. The FOIA provision that an authority may in certain circumstances neither confirm nor deny whether it holds information is not reflected in regulation 12(5)(b).
51. Under FOIA, information marked ‘without prejudice’ is not necessarily protected by LPP under section 42 FOIA. In contrast, information marked ‘without prejudice’ can sometimes be excepted under regulation 12(5)(b), simply because “the course of justice” is a broader term (see earlier).
52. Whilst section 30 FOIA (criminal investigations and proceedings) refers to “information if it has at any time been held by the authority”, the focus in regulation 12(5)(b) is instead on whether disclosure of the information would have an adverse effect. In contrast to section 30 FOIA, there is no requirement for information to have been held for any particular period or purpose.

53. With regard to court and tribunal records, regulation 12(5)(b) differs from section 32 FOIA in that section 32 applies to information that is held “**only** by virtue of being contained in” a court record or in a document held by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration. Regulation 12(5)(b) has no such restriction, and can therefore apply to information that was originally held for purposes other than court proceedings, as long as the public authority can demonstrate an adverse effect on the course of justice.
54. FOIA provides that court records over 30 years old cannot be exempt under s32. There is no equivalent provision for regulation 12(5)(b). Instead the question would be the extent to which any adverse effect would result from disclosure.

Other considerations

55. Additional guidance is available if you need further information, as listed above in this guidance.

More information

56. This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
57. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
58. If you need any more information about this or any other aspect of freedom of information, please [contact us: see our website www.ico.gov.uk](http://www.ico.gov.uk).